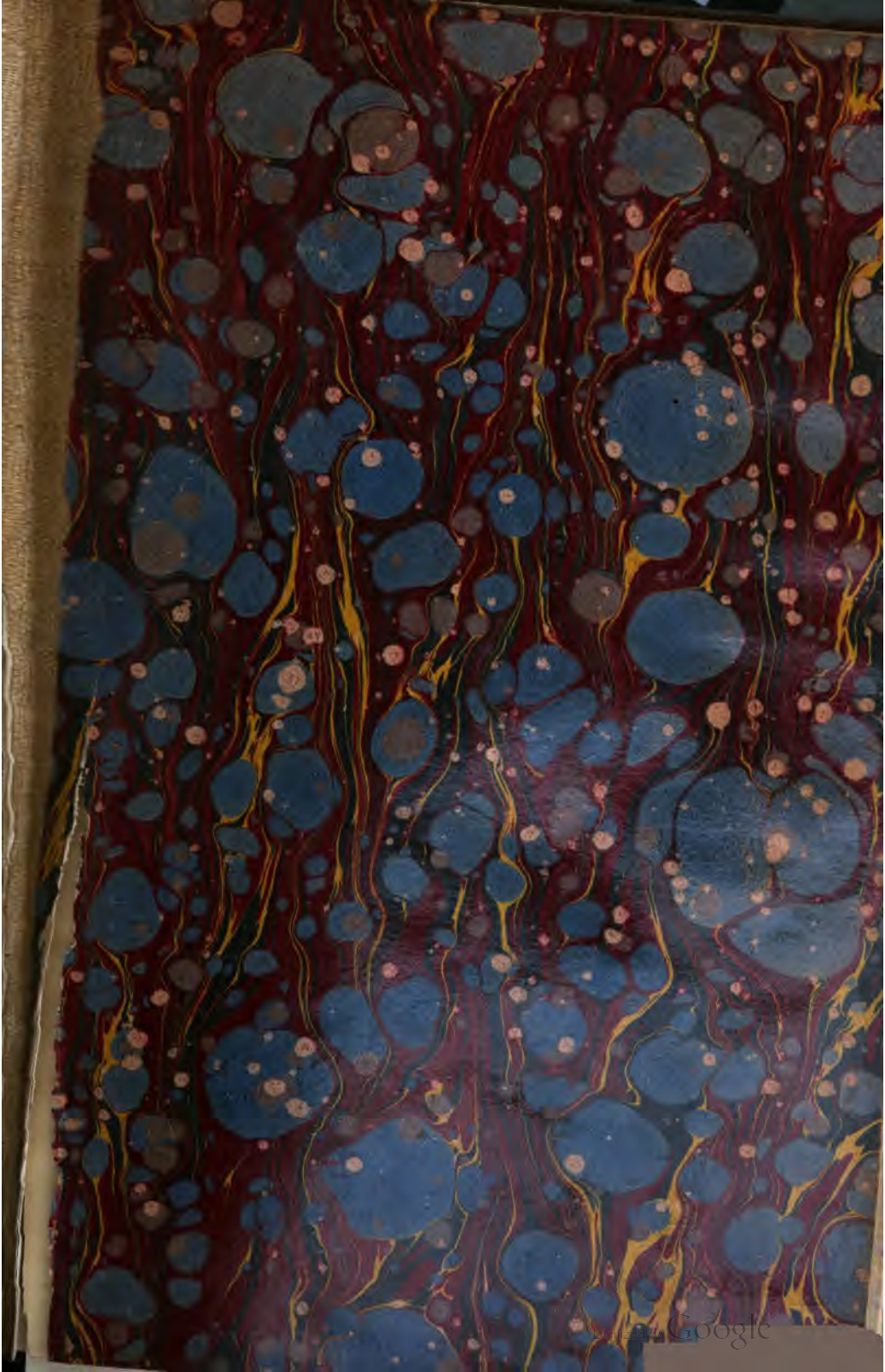

THE LAW

OF

MONEY-LENDING.

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MONEY-LENDING,

PAST AND PRESENT:

BEING A SHORT HISTORY OF THE USURY LAWS IN ENGLAND, FOLLOWED BY A TREATISE UPON

The Money-Lenders Act, 1900.

BY

JOSEPH BRIDGES MATTHEWS,

OF THE MIDDLE TEMPLE AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW.

"The true spirit of usury lies in taking an unjust and unreasonable advantage of one's fellow creatures."—BURNETT, J., *Earl of Chesterfield* v. *Janssen*, 2 Ves. Sen. 141.

"The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger."—*Ib.*

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OF USURY.

Usury is conceded on account of the hardness of man's heart: For since there must be borrowing and lending, and men are so hard of heart, as they will not lend freely, usury must be permitted. It is good to set before us the incommodities and commodities of usury; that the good may be either weighed out, or culled out; and warily to provide, that while we make forth to that which is better, we meet not with that which is worse. The discommodity of usuries are . . . that it makes poor merchants. For as a farmer cannot husband his ground so well, if he sit at a great rent: so the merchant cannot drive his trade so well if he sit at great usury. . . . It is the canker and ruin of many men's estates.

The commodities of usury are . . . First, that howsoever usury in some respect hindereth merchandising, yet in some other it advanceth it. . . . The second is that, were it not for this easie borrowing upon interest, men's necessities would draw upon them a most sudden undoing: in that they would be forced to sell their meanes (be it land or goods) far under foot: and so, whereas usury doth but gnaw upon them, bad markets would swallow them up. . . . The third and last is that it is a vanitie to conceive that there would be ordinary borrowing without profit: and it is impossible to conceive the number of inconveniences that will ensue if borrowing be cramped. . . . It appeares by the ballance, of commodities and incommodities of usury, two things are to be reconciled:—The one, THAT THE TOOTH OF USURY BE GRINDED, THAT IT BITE NOT TOO MUCH: *The other, that there be left open a meanes to invite moneyed men to lend to the merchants, for the continuing and quickening of trade.*

BACON'S ESSAY, "OF USURY."

PREFACE.

THE signs of the times, as I interpret them, appear to indicate that it is not improbable that at no very distant time the usury laws may to some extent be re-enacted, possibly with reference to loans of money on personal security of less than a certain amount, or to members of the working classes, who, despite the general spread of education amongst the people, appear to be regarded by Parliament as not capable of managing their own affairs unless hedged round with all sorts of protective legislation.

Partly in view of this, and partly because it has occurred to me that the usury laws, although long since repealed, may, as a branch of legal history, be not altogether devoid of interest to the profession, if presented in a readable form, I have devoted the first part of this book to a short sketch of the History of Usury in England, which, however, does not profess to be exhaustive of the subject. My material has been merely such as my own scantily furnished bookshelves have afforded, and I can only hope that an indulgent profession will excuse the shortcomings which must necessarily characterise an essay written under such conditions.

Part II. deals with the Money-lenders Act, 1900, and comprises all decided cases reported in the Law Reports, the Law Journal Reports, the Law Times Reports, and the Times Law Reports, down to the time of the manuscript going to press (January, 1906). References will also be found to a few cases reported only in *The Times* newspaper, and also to one or two unreported cases which have come under the writer's observation. In the references to cases given in the notes only one report is mentioned. References to other reports are given in the Table of Cases.

In the Appendices will be found a reprint of *The Times* report of the considered judgment of Mr. Justice CHANNELL in *Carringtons, Ld.* v. *Smith*, for permission to print which I am greatly indebted to the proprietor of that newspaper, and also the judgments of the Court of Appeal in *Samuel* v. *Burton*, and of Mr. Justice DARLING in *Samuel* v. *Mills*, printed from transcripts of shorthand notes very kindly placed at my disposal by gentlemen who were professionally engaged as solicitors in those cases.

As for the Act itself I do not hold myself competent to subject it to criticism from the point of view of public policy; but from the point of view of a mere lawyer I am moved to offer two criticisms upon it. These are: Firstly, that the terms "excessive" and "harsh and unconscionable" are terms of vague import which render

the equal administration of the Act in the highest degree difficult, if not impossible; and, secondly, that if a loan transaction is of such a character that it ought, in justice to the borrower, to be set aside, there cannot be any justification for differentiating between lenders who are "money-lenders" as defined by the Act and lenders who are not within such definition. It is unfortunate that Judges should be called upon to review the transactions of mankind without being furnished by the Act which confers the jurisdiction with a more clear and certain standard of decision than the Money-lenders Act affords. The use of such a word as "excessive" is incapable of anything approaching precise definition. This word can only be given effect to by drawing a line which must of necessity be purely arbitrary, and it is hopeless to expect anything like uniformity of view or of practice among the Judges upon such a question. It involves no disrespect to any of the learned Judges to apply to them in this connection Selden's famous gibe at the Chancellors: "Equity is a roguish thing: for law we have a measure: we know what to trust to. Equity is according to the conscience of him that is Chancellor: and as that is larger or narrower so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a foot, 'the Chancellor's foot'; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an

indifferent foot; 'tis the same thing in the Chancellor's conscience" (*a*).

It may reasonably be hoped that the considered judgment of Mr. Justice CHANNELL in *Carringtons, Ld.* v. *Smith* (printed in Appendix F.), may bring about something like uniformity of decision upon the subject of re-opening unsecured loan transactions upon the mere ground of "excessive" interest. The decision of the Court of Appeal, however, in *In re A Debtor*, would seem difficult to reconcile with Mr. Justice CHANNELL'S view, for reasons which I have endeavoured to state at page 40 of the text; and it is perhaps too much to hope that even that judgment, carefully considered as it was, has placed the principle of decision beyond the reach of controversy. Upon the question what rate of interest should be allowed in cases where the transaction is re-opened that case throws no light whatever. As regards the second criticism which I have ventured upon, the Act applies only where the lender is "a money-lender" within the meaning of the Act; but money may be and constantly is lent by persons who are not "money-lenders" within the meaning of the Act. Whether the interest in any particular case is "excessive," or whether the transaction in any particular case is "harsh and unconscionable," in no way depends upon whether the lender happens or does not happen to be "a money-lender" as

(*a*) Selden's "Table Talk," title "Equity," p. 37.

defined by the Act. Where relief is given, it is given, I take it, upon the ground that justice to the borrower requires that it should be given. Why then should relief in any given case be granted or withheld according as the lender does or does not fall within the definition clause of the Act? Can it be that the object of the Legislature was to encourage needy persons to have recourse to a class of lenders notoriously usurious, rather than endeavour to supply their necessities elsewhere? Is the borrower less entitled to relief because the lender is a person whom (not being a professional money-lender) he had less cause to suppose beforehand would drive a hard bargain with him?

Is the business of money-lending lawful or unlawful? Ought not all men to be equal before the law? If lawful, and all men ought to be equal before the law, why should a man who carries on business as a money-lender have a transaction ripped up upon the ground that the interest charged is "excessive," or upon the ground that it is "harsh and unconscionable," when it would not be ripped up in the case of a lender who does not happen to carry on business as a money-lender?

When, if ever, I come by satisfactory answers to the foregoing questions, I will be ready to subscribe to "the wisdom of the Legislature" in this connection more cordially than I am able to do at present.

I have to thank my friends, Mr. J. A. Hawke and Mr. A. E. N. Jordan, for kindly reading the manuscript of Part I., and for suggestions which I have adopted; also Mr. Robert Woodward, Jun., for assistance in preparing Index and Table of Cases.

J. B. MATTHEWS.

2, PAPER BUILDINGS, TEMPLE.
January, 1906.

TABLE OF CASES.

PART II.

TABLE OF STATUTES

REFERRED TO IN PART I.

TABLE OF STATUTES

REFERRED TO IN PART II.

ADDENDUM.

To page 13.—By 11 Hen. VII. c. 8, the statute 3 Hen. VII. c. 5, was repealed, and it was enacted that he that lent his money upon usury, or made any bargain of lands or goods grounded upon usury, should forfeit the one half thereof.

THE LAW OF MONEY-LENDING.

PART I.

A SHORT HISTORY OF THE USURY LAWS IN ENGLAND.

INASMUCH as previous to the Statute of the Jewry (3 Edw. I.), which was passed fifteen years before the expulsion of the Jews from England (*a*), there was one law for the Jew and another for the Christian, in the matter of the taking of Usury, it would seem a convenient method of treating the subject to state shortly in the first place what the law was with regard to the Jews.

We learn from the Dialogus de Scaccario (*b*) that in the reign of Henry II. the ordinary rate of interest which the Jew was allowed to take was twopence in the pound per week, or 43⅓ per cent. per annum, compound interest being forbidden. With the special laws relative to the Exchequer of the Jews, and the system of registration of the securities which the Jews took from their debtors, we are not here concerned. The subject is fully treated by Mr. J. M. Rigg, in his Introduction to the Selden Society's volume, Select Pleas, Starrs, and Records of the Jewish Exchequer. Suffice

(*a*) For the history of the Jews in England, see Mr. J. M. Rigg's Introduction to Vol. 15 of the Selden Society :—Select Pleas, Starrs, and Records of the Jewish Exchequer.

(*b*) Lib. ii. § x.

it here to say that special facilities were given to the Jewish creditor in the matter of realising his "gage" of his Christian debtor's lands, which he was empowered to seize by summary process, and either to sell after the lapse of one year, or to hold until he had realised the amount of his claim.

By chapters 10 and 11 of Magna Charta, it was provided that debts due to the Jews were to bear no interest during the minority of the heir of a deceased debtor; the widow was to have her dower, and pay nothing of the debt; and the children were to be provided with necessaries before payment out of the residue. If the modern system of life insurance had been in vogue at this period it might accordingly have been truly said that the Jew creditor had a substantial insurable interest in the life of his Christian debtor.

The above provision of Magna Charta in favour of the heir during his minority was re-enacted by the Statute of Merton (20 Hen. III. c. 5) in the following terms:—"Likewise it is provided and granted by the King that from henceforth usuries shall not run against any being within age, from the time of the death of his ancestor (whose heir he is), unto his lawful age; so, nevertheless, that the payment of the principal debt, with the usury that was before the death of his ancestor (whose heir he is), shall not remain."

This statute, it will be observed, does not in terms mention Jews, but as no other usurers were tolerated at this period, it was evidently confined in its operation to them. The next, and last, statute which dealt with this subject, was the Statute of the Jewry (3 Edw. I.), by which interest was made irrecoverable by legal process, and the Jew was thus subjected to the same disability in the matter of taking usury as the Christian. The Jews seem, however, to have found means to evade the prohibition of the statute. One ingenious device to which they appear to have had recourse was binding their

borrower to a contract for the periodical delivery of so much merchandise, with a pecuniary penalty for every default.

The evasion by the Jews of the prohibition of the Statute of the Jewry was, if not the occasion, at any rate the excuse for their expulsion a few years later, as witness the language of the King's writ of expulsion, the recitals of which ran as follows (*c*):—"Edward, &c. to the Treasurer and Barons of the Exchequer, greeting. Whereas in our Parliament holden at Westminster, on the Quindene of St. Michael, in the third year of our reign, we, moved by solicitude for the honour of God and the well-being of the people of our realm, did ordain and decree that no Jew should henceforth lend to any Christian at usury upon security of lands, rents, or aught else, but that they should live by their own commerce and labour; and whereas the said Jews did thereafter wickedly conspire and contrive a new species of usury more pernicious than the old, which contrivance they have termed *curialitas*, and have made use of the specious device to the abasement of our said people on every side, thereby making their last offence twice as heinous as the first; for which cause we, in requital of their crimes . . . have banished them our realm as traitors. Now, &c., &c."

The reason for the differential treatment of Jew and Christian previous to the prohibition of usury by the Statute of the Jewry is well known to all students of English history. "Under the Norman and early Angevin kings the Jews were employed as a sponge to suck up the wealth of their subjects, and be periodically squeezed to supply the wants of the Crown." Madox (History of the Exchequer, 2nd ed., ii. 221—261) thus sums up their position as disclosed by the Exchequer records: "The King seemed to be absolute lord of their estates and effects, and of the persons of them, their wives, and

(*c*) This is Mr. Rigg's translation.

children. 'Tis true he let them enjoy their trade and acquests, but they seemed to trade and acquire for his profit as well as their own; for at one time or other their fortunes, or great part of them, came into his coffers" (*d*).

It was, indeed, a strange sort of morality which, whilst forbidding a Christian to acquire unholy gain by usury, yet permitted a Christian king to act as an accessory before the fact, nay, more, to be an actual partner and participator in the usurious gains of his serfs—for such in the eye of the law and in fact the Jews were—gains, moreover, made at the expense of his Christian subjects (*e*). So much for the Jews.

As to the remaining subjects of the realm, usury was a thing unlawful. By the laws of Edward the Confessor (who, as the laws tell us, had heard it said whilst he was sojourning at the court of the King of the Franks, that usury was the root of all vices (*f*)) usurers were banished the kingdom, and a man convicted of the crime of usury forfeited all his substance, and was to be treated as an outlaw. In Glanvill's time, however (*temp.* Hen. II., *circa* 1187), the King's Courts would seem to have had no punishment to inflict upon a living usurer. The law appears to have left the usurer to the exclusive cognisance and discipline of the Ecclesiastical Courts, which punished him with ecclesiastical penalties *pro salute animæ*, but if a usurer died in his sin the King seized his goods. Thus Glanvill (vii. 16) says (*g*): "When anyone dies intestate all his chattels are understood to belong to

(*d*) Taswell-Langmead's Constitutional History, 3rd ed., by Carmichael, p. 138.

(*e*) Coke says that between the fiftieth year of Hen. III. and the second year of Edw. I., which was not above seven years complete, there was paid into the King's coffers 420,000*l.* of and for the usury of the Jews! (Commentary on the Statute of Merton in the 2nd Institute).

(*f*) Compare 1 Timothy, 6, 10.

(*g*) "A translation of Glanvill, by John Beames, Esq., of Lincoln's Inn, Barrister-at-Law." The Legal Classic Series: John Byrne & Co., Washington, 1900.

his lord; and, if he has more lords than one, each of them shall recover such chattels as may be found within his fee. But all the effects of a usurer (whether he make a will or not) belong to the King. But it is not the custom for anyone, whilst living, to be appealed or convicted of the crime of usury; but among other Regal Inquisitions it is usually inquired and proved who have died in this offence, and that by the oaths of twelve lawful men of the vicinage, which being proved in Court, all the moveables and chattels which belonged to the deceased usurer shall be seised to the King's use, without any regard to the person in whose hands they may be found. His heir is for the same reason deprived of the inheritance according to the law of the realm, the inheritance itself reverting to the lord. It should, however, be observed, that if anyone has, during a certain period of his life, been guilty of this crime, and be publicly accused of it in the community where he lived, if he desisted from his error before his death, and was penitent, neither he nor his property shall after his death be liable to the penalties of usury. It ought, therefore, to be evident that a man has died a usurer, in order that he may be so adjudged after his death and his effects disposed of as those of a usurer."

The "Regal Inquisitions" referred to by Glanvill were the inquisitions taken before the itinerant justices. Bracton (*h*) (lib. 3, fo. 116, 117), who wrote somewhere about the middle of the thirteenth century, is to the like effect. He tells us that it was an article of the charge of inquiry by the Justices in Eyre "Of Christian usurers deceased, who they were and what chattels they had, and who was in possession of them," and that no one should receive usury by any art or practice.

But when the King had discovered how to so order matters with regard to the Jews that he could successfully squeeze them to the uttermost, and possess himself of

(*h*) And see Fleta, lib. 2, c. 1, cap. "Itineris."

the gains of their usury, it is evident that he must have viewed with a very unfriendly eye the operations of Christian usurers, by whose practices the flow of money into the coffers of the Jews must of necessity have been more or less interrupted, with the ultimate consequence of a diversion of usurious gains from the royal treasury. That Christian usurers did in fact compete to an appreciable extent with the Jews seems pretty clear from the speech which Chief Rabbi Elias is reported to have made to the Council in the year 1262, wherein he complained of "the Papal usurers by whom the Jews were supplanted and impoverished" (*i*).

The temptation to furbish up the rusty old laws of Edward the Confessor, or in some other way to get forfeitures from Christian usurers in their lifetime, and not to leave them to the exclusive jurisdiction of the Church, must have been very strong to kings frequently in urgent need of money. Accordingly, at some time or other, but when precisely I have not been able to ascertain, the inquiries by the Justices in Eyre seem not to have been confined to usurers deceased, but to have extended to usurers living.

Sir Edward Coke, after quoting the above-cited passage from Bracton, continues (*k*): "and divers were indicted for taking of usury before Justices in Eyre, and some were pardoned by the King and others not." In another place he cites the following entry on the *coram rege* roll, 6 Edw. III., "Johannes Hopd convictus per juratores pro usura capiend' 11*s.* 8*d.* pro 20*s.* præstand' et sic de similibus," and goes on to relate as follows:—"Many of the citizens of London giving over trade and traffic (which, he observes, is the life of the Commonwealth, and specially of an island) and betaking themselves to live upon usury, Sir William Walworth being Lord Mayor, by the advice of the aldermen, his brethren,

(*i*) Selden Soc., vol. 15, Introd., p. 34.
(*k*) 3rd Inst. c. 70.

took such good and strict order for the execution of laws and for suppression of usury in the city of London, as the Commons in Parliament put up a petition to the King in these words, 'That the order that was made in London against the horrible vice of usury, might be observed throughout the whole realm,' whereunto the King answered that the old law should continue. And after this Sir John Northampton, Mayor of the city of London, by the advice of the aldermen, his brethren, took more strict order for the suppression of unlawful usury within the city of London; which had so good success, as the Commons in Parliament petitioned the King in these words: 'The Commons pray that against the horrible vice of usury practised as well by the clergy as laity, the order made by John Northampton, late Mayor of London, may be executed through the realm'; whereupon the King answered: 'The King willeth those ordinances to be viewed and if they be found to be necessary, that the same be then affirmed.' And here it is to be observed, that of antient time the notable merchants of London detested usury and dry exchange. By the statutes 3 Hen. VII. and 11 Hen. VII. all usury is damned and prohibited, and there it is called dry exchange. So as usury is not only against the law of God, and the laws of the realm, but against the law of nature." "Usura contra naturam est, quia usura sua natura est sterilis, nec fructum habet." Chief Baron Comyns in his Digest went so far as to lay it down for law that "Usury was an offence by the common law, and upon conviction the usurer forfeited his goods to the King, and his lands to the lord of the fee, which accords with the Mirror of Justices." Comyns' authorities for this are the Mirror of Justices and Sir Edward Coke's 3rd Institute, c. 70. The passage referred to in Coke is as follows:—"It appeareth that by the antient laws of this realm usury was unlawful and punishable, although the punishment was not always one, but sometimes greater and sometime lesser, and therefore at

the Parliament holden in the fifteenth year of Edward III. it was enacted and declared, according as it had been sometime holden, that the King and his heirs should have cognisance of usurers after their death, and that the Ordinary of Holy Church should have conusance of usurers alive forasmuch as to them it appertains to compel them by the censures of Holy Church, for the sin, to make restitution of usuries taken against the law of Holy Church. But this statute was afterward repealed." The statute 15 Edw. III. referred to was short lived, for by another statute of the same year it was repealed. Upon such repeal the King issued the following writ to the Sheriffs:—"Edward, by the grace of God, &c., to the Sheriff of [Lincoln], greeting. Whereas at our Parliament summoned at Westminster in the Quinzene of Easter last past, certain articles expressly contrary to the laws and customs of our realm of England, and to our prerogatives and rights royal, were pretended to be granted by us by the manner of a statute; we, considering how that by the bond of our oath we are tied to the observance and defence of such laws, customs, rights, and prerogatives, and providently willing to revoke such things to their own state which be so improvidently done, upon conference and treatise thereupon had with the earls, barons, and other wise men of our said realm, and because we never consented to the making of the said statute, but as then it behoved us, we dissimulated in the premises by protestations of revocation of the said statute, if indeed, it should proceed, to eschew the dangers which by the denying of the same we feared to come, forasmuch as the said Parliament otherwise had been without dispatching anything in discord dissolved, and so our earnest business had likely been ruinated (which God prohibit), and the said pretensed statute we permitted then to be sealed: It seemed to the said earls, barons, and other wise men that sithence the said statute did not of our free will proceed, the same be void, and ought not to have the

name or strength of a statute, and therefore we have decreed the said statute to be void," &c., &c.

As the statute thus denounced dealt with other matters as well as with usurers, it may be that it was not the particular enactment relating to usurers with which the King had any special cause to be dissatisfied.

Nevertheless, it may be permissible to hazard the surmise that the Easter Parliament had made an attempt to restore the law as to usurers to the position which we have seen it stood in, in the time of Glanvill, and that the King was resolved not to relinquish the profitable jurisdiction over living usurers, which had in some manner or other grown up between Glanvill's time and the passing of the obnoxious statute. Comyns' other authority, the Mirror of Justices, the unreliable character of which as an authority is better appreciated at the present day than it was when Comyns wrote, contains the following rigmarole about usurers under the head "Of sins against the Holy Peace" (*l*):—"Into the sin of larceny fall those who take purses or bags, and who otherwise commit larceny by sleight and dexterity of their hands, and all their abettors. . . . Into this sin fall usurers who lend money or money's worth at a fixed usury in a manner which shows evil covetousness." But as the author also tells us that a host of other wrongdoers, including "pleaders who take outrageous or undeserved salaries" also "fall into this sin," we cannot accept his classification of the taking of usury under the head of larceny as anything more than an expression of his detestation of the practice. Elsewhere he tells us that "contracts are vicious" in various instances, one of which is "by reason of the intervention of a sin," of which he gives as illustrations the following:—"As if I grant that, if I do not do this or that thing for you, it shall be lawful for you or for another to commit against

(*l*) I copy from the Selden Society's edition. The translation is that of Mr. Whittaker.

me the sin of homicide, of wounding, of imprisonment, of disseisin, or of usury, *e.g.*, that you should demand from me one hundred for ten, or any other sin."

In Book iv. 12, "Of punishments," our author says that some are punishable "by loss of all goods moveable and immoveable," as "usurers attainted of usury after their deaths, but not if attainted while alive, for in that case they only lose their moveables, and may amend their sin by penance and repentance and have heirs."

Britton, whose exact date is uncertain, but who probably wrote towards the end of the thirteenth century, includes an inquiry "Of usurers" amongst the Articles of the Sheriff's Tourn; and the Mirror, under the head, "View of Frankpledge," includes in the Articles of the Tourn "Of Christian usurers and of all their goods."

The inquiry "Of usurers" would seem rather to point to usurers living than to usurers dead, whilst the inquiry "Of Christian usurers and of all their goods," seems rather to point to usurers deceased. Unfortunately, the authority of Britton as to the Articles of the Tourn is somewhat shaken by the fact that he includes "Of apostates and heretics" in the articles, and in Pollock and Maitland's History of English Law (*m*) it is pointed out that this cannot be relied upon as evidence that either apostacy or heresy were ever actually punished at the Tourns. Accordingly, the inclusion of the inquiry "Of usurers" in the early Articles of the Tourn is not of itself any very sufficient proof that the jurisdiction to punish usurers was ever actively exercised in his time. That the Tourns, however, in later times, and before they fell into decay, actually punished usurers, is highly probable, if not practically certain. The jurisdiction of the Tourn, and the jurisdiction of the Franchise Leet, and View of Frankpledge, when these Courts were in their vigour, was practically the same, and records are extant which prove that Courts Leet did actually upon

(*m*) 1st ed., vol. 2, p. 547.

occasion punish usurers. See "The Leet Jurisdiction of Norwich," vol. 5, Selden Society, and "The Court Baron," vol. 4, Selden Society. In the former we have two instances—one of a presentment of usury, and one of an amercement for that offence—and in the latter, amongst the articles as to which a leet jury, A.D. 1340, was sworn to inquire, is "Whether there be among you any usurer: Present the facts."

Dalton (1623 ed.) includes "Of usurers" in the "List of things inquirable in the Torne." But this does not throw much light upon the question of the common law jurisdiction of the Tourn, what its precise character was, or to what extent it was actually put in practice against usurers; for by this time the earlier Statutes of Usury had been passed, and the 13 Eliz. c. 8, was in force, which, as we shall see, had erected usury into a criminal offence, and may have thus given a new point to a jurisdiction which might otherwise have already begun to fall into disuse, or indeed might have actually become obsolete. To what extent, if at all, the Tourns made any attempt to put in force against usurers the Statutes of Usury, I do not know. Before the statute 1 Edw. IV. c. 2, the Sheriff's Tourn had power to arrest and punish offenders, but by that statute they were deprived of this power, and it was enacted that upon all presentments and indictments which should be taken before any sheriff, undersheriff, or other ministers in their Tourns or law days they should have no power to attach, arrest, or put in prison, nor to levy or take any fines or amerciaments of any person so indicted or presented before them by reason or colour of any such indictment or presentment; nor to take of any person so indicted or presented any fine or ransom; but that the said sheriff or other ministers should bring and deliver all such indictments and presentments taken before them in their Tourns to the justices of the peace, at their next sessions of the peace that should be holden

in the county where such indictments or presentments should be taken, and the justices of the peace were then to proceed upon such indictments and presentments.

This statute, however, did not extend to Courts Leet, whose jurisdiction was left untouched.

Blackstone (1765) does not mention usurers as subjects of jurisdiction of the Sheriff's Tourn, and he says that "both the Tourn and the Leet have been for a long time in a declining way . . . and their business hath for the most part devolved upon the Quarter Sessions."

Impey (Law of the Sheriff, 1817) does not mention the subject of usurers, nor does he give the Articles of the Tourn.

The Tourn, after having been long obsolete, was finally abolished by the Sheriffs Act, 1887.

So much for the jurisdiction of the Sheriff's Tourn and Courts Leet to punish or inquire of usurers.

If the surmise which I have ventured to put forward is well founded as to the jurisdiction to punish living usurers having possibly had its origin in a desire to prevent Christian usurers from competing with the Jews, the expulsion of the Jews from England, or rather the passing of the Statute of the Jewry, should have led to a restoration of the exclusive jurisdiction of the Church over living usurers; but a jurisdiction which had become a source of profit to the Crown was not likely to be relinquished merely because the original reason for the creation and exercise of such jurisdiction had passed away.

We now come to consider the statutes which were passed from time to time prohibiting or regulating the the taking of usury.

By 3 Hen. VII. c. 5 (*n*), "all bargains by the name of dry exchange shall be void, whereby any certain sum shall be lost," and by c. 6 (*o*) of the same statute, "none shall make any exchange without the King's licence, or make

(*n*) Rep. 11 Hen. VII. c. 8. For this statute see Addendum.
(*o*) Rep. 37 Hen. VIII. c. 9.

exchange or rechange of money to be paid within the land, but only such as the King shall depute thereunto to keep and make answer for such exchanges and rechanges upon the pain contained in 14 Ric. II. c. 2 (*i.e.*, forfeiture)," and " all unlawful chevisance and usury shall be extirpate; all brokers of such bargains shall be set on the pillory, put to open shame, be half a year imprisoned, and pay 20*l.*"

The statute 37 Hen. VIII. c. 9, was as follows :—

Preamble. Where before this time divers and sundry Acts, statutes and laws have been ordained, had and made within this realm for the avoiding and punishment of usury, being a thing unlawful, and of other corrupt bargains, shifts and chevisances, which Acts, statutes and laws been so obscure and dark in sentences, words, and terms, and upon the same so many doubts, ambiguities and questions have risen and grown, and the same Acts, statutes and laws been of so little force or effect that by reason thereof little or no punishment hath ensued to the offenders of the same, but rather hath encouraged them to use the same: for reformation thereof be it enacted, &c.

Sect. 1. That all and every the said Act, statutes and laws heretofore made of or concerning usury, shifts, corrupt bargains and chevisances, and every of them, and all pains, forfeitures and penalties concerning the same, and every part thereof, shall from henceforth be utterly void and of none effect, to all intents, constructions and purposes.

Sect. 2. And be it further enacted that no person or persons of what estate, degree or condition soever he or they may be, from and after the last day of January next coming, shall by himself, factor, attorney, servant or deputy, sell his merchandises or wares to any person or persons, and within three months next after, by himself, factor, attorney, deputy, or by any other person or persons to his use and behoof, buy the same merchandises or

wares, or any part or parcel thereof, upon a lower price, knowing them to be the same wares or merchandises that he before did so bargain and sell, upon the pains and forfeitures hereafter limited in this statute.

Sect. 3. And be it enacted that no person or persons, of what estate, degree, quality or condition soever he or they be, at any time after the said last day of January next coming, by way or mean of any corrupt bargain, loan, exchange, chevisance, shift, interest of any wares, merchandises or other thing or things whatsoever, or by any other corrupt or deceitful way or mean, or by any covin, engine, or deceitful way or conveyance, shall have, receive, accept or take in lucre or gains for the forbearing or giving day of payment of one whole year of and for his or their money or other things that shall be due for the same wares, merchandises, or other thing or things, above the sum of ten pound in the hundred, and so after that rate and not above, of and for a more or less sum, or for a longer or shorter term, and no more or greater gain or sum thereupon to be had, upon the pains and forfeitures hereafter in this Act mentioned and contained.

Sect. 4. Enacts a similar prohibition with reference to sales and mortgages of manors, lands, tenements, and hereditaments.

Sect. 5. And be it further enacted, &c., that if any person or persons of what estate, &c., &c. [as in sect. 3] at any time after the said last day of January next coming, shall do any act or acts, thing or things, contrary to the tenor, form or effect of this statute, or of any clause, article or sentence contained in the same, that then all and every offender and offenders therein, or in any part thereof, shall forfeit and lose for every such offence the treble value of the wares, merchandises, or other thing or things, so bargained, sold, exchanged, or shifted, and the treble value of the issues and profits of the said manors, lands, tenements and hereditaments so had, taken, or received by reason of any such bargain, sale, or mortgage,

and also shall have and suffer imprisonment of his body and make fine and ransom at the King's will and pleasure: the moiety of which forfeiture of the treble value shall be to the King, and the other moiety to him or them that will sue for the same in any of the King's Courts, no wager of law, essoin, or protection shall be admitted or allowed.

Sect. 6. Provided alway and be it enacted, &c., that this Act, nor anything therein contained, shall not in anywise extend to any lawful obligation indorsed with a condition, nor to any statute or recognisance made or to be made for the payment of a lesser sum, so that the same obligation, statute, or recognisance be made for a true, just, and perfect debt, or for the performance of any other true covenants, made or to be made upon a just and true intent had between the parties, other than in cases of usury, interest, corrupt bargains, shift or chevisance; ne yet shall extend to any recovery, fine, feoffment, release, confirmation, or grant made or to be made upon condition with a true intent, other than to such recoveries, &c., &c., as shall be made upon condition extending to usury, interest, corrupt bargain, shifts, or chevisance; anything in this statute contained, or any law, statute, or ordinance heretofore had, used, or made to the contrary notwithstanding.

By 5 & 6 Edw. VI. c. 20, the last-mentioned statute was repealed, and it was enacted that no person by any means should lend or forbear any sum of money for any manner of usury or increase to be received or hoped for above the sum lent, upon pain to forfeit the sum lent, and the increase, and imprisonment and fine at the King's pleasure.

By this statute, it will be observed, the taking of any interest whatever upon any loan of money was absolutely prohibited. The reason assigned in its preamble for the repeal of 37 Hen. VIII. c. 9, was that the former Act had been construed to give a licence and sanction to all

usury not exceeding 10 per cent., which was "utterly against Scripture."

The Edwardian statute, however, as might have been anticipated, failed to effect its purpose, as we learn from the preamble to the 13 Eliz. c. 8, by which it was in its turn repealed, and by which 37 Hen. VIII. c. 9, was re-enacted with certain additions.

13 Eliz. c. 8 was as follows:—

Preamble. Whereas in the Parliament holden the seven-and-thirtieth year of the reign of our late Sovereign Lord King Henry the Eighth, of famous memory, there was then made and established one good Act for the reformation of usury: By which Act the vice of usury was well repressed, and specially the corrupt chevisance and bargaining by way of sale of wares, and shifts of interest; and where since that time by one other Act made in the fifth and sixth years of the reign of our late Sovereign Lord King Edward the Sixth, the said former Act was repealed, and new provisoes for repressing of usury devised and enacted; which said latter Act hath not done so much good as it was hoped it would, but rather the said vice of usury, and specially by way of sales of wares and shifts of interest, hath much more exceedingly abounded, to the utter undoing of many gentlemen, merchants, occupiers and others, and to the importable hurt of the Commonwealth, as well for that in the later Act there is no provision against such corrupt shifts and sales of wares, as also for that there is no difference of pain, forfeiture, or punishment upon the greater or lesser exactions and oppressions by reason of loans upon usury (*p*).

Sect. 2 repeals 5 & 6 Edw. VI. c. 10, as from the 25th day of June then next, and re-enacts 37 Hen. VIII. c. 9.

(*p*) This is a singular reason to assign in view of the penalty of fine and imprisonment imposed by the Act, which, being discretionary, could, one would have thought, have been adapted to the gravity of the offence. This seems rather to suggest that criminal proceedings against offenders had not been of frequent occurrence.

Sect. 3 utterly avoids all bonds, contracts and assurances, collateral or other, to be made for the payment of any principal or money to be lent, or covenant to be performed upon or for any usury or doing of any thing against the revived Act of Henry, upon or by which loan or doing there should be reserved or taken above 10 per cent. per annum.

Sect. 4 subjects to the penalties of *præmunire* all brokers, solicitors, and drivers of bargains for contracts or other doings against the revived statute.

Sect. 5 enacts as follows:—"And forasmuch as all usury, being forbidden by the law of God, is sin and detestable, be it enacted, that all usury, loan, and forbearing of money, or giving days for forbearing of money, by way of loan, chevisance, shifts, sale of wares, contracts or other doings whatsoever, for gain mentioned in the said statute, which is now revived, whereupon is not reserved or taken, or covenanted to be reserved, paid, or given to the lender, contractor, shifter, forbearer, or deliverer above the sum of 10*l.* for the loan or forbearing of a hundred pounds for one year, or after that rate for a more or lesser sum or time, shall be from the 25th of June next coming punished in form following: that is to say, that every such offender against this branch of this present statute shall forfeit so much as shall be reserved by way of usury against the principal, for any money so to be lent or forborne; all such forfeitures to be recovered and imployed as is limited for forfeitures by the said former statute now revived."

It will be observed that this statute did not *legalise* usury to any extent. It is, therefore, quite incorrect to state, as is sometimes done, that this statute fixed the legal rate of interest at 10 per cent.

By *sect.* 6, Justices of Oyer and Determiner, and Justices of Assize in their circuits, and Justices of the Peace in their Sessions, mayors, sheriffs, and bailiffs of cities, were given full power and authority to inquire,

hear and determine all and singular offences committed against the said statute then revived.

By *sect.* 7, it was further enacted that the said statute then revived should be most largely and strongly construed for the repressing of usury, and against all persons that should offend against the true meaning of the said statute by any way or device, directly or indirectly.

By *sect.* 8, it was provided that this statute should not extend, nor be expounded to extend unto any allowances or payments for the finding of orphans, according to the ancient rates or customs of the city of London, or any other city where like order was for the custody of orphans and their goods, as was in the said city of London.

By *sect.* 9, it was provided that if any person or persons should, from or after the said 25th of June, offend contrary to the said statute revived by that present Act: That then all and every such offender or offenders should and might also be punished and corrected, according to the Ecclesiastical laws theretofore made against usury; and that all and every person and persons offending in usury, shifts, or chevisance, against that present Act, and not taking or receiving but only after the rate of 10*l.* in the hundred or under for a year, should be only punishable by the pains and forfeitures provided and appointed by that Act, against such as should not take or receive over and above the rate of 10*l.* in the hundred for a year, and not otherwise. The Act was to continue for five years next after the end of the then present Parliament, and from thence unto the end of the first session of the Parliament then next ensuing.

Reeves (History of English Law, c. 33) observes upon this statute:—"So much was the Legislature sharpened against these practices as to put the cognisance of them in the hands of inferior magistrates, as though they were matters which concerned the very police." This observation would seem to lose much of its force when the

jurisdiction of the Tourns and the Leet over usurers is borne in mind, and still less perhaps is the entrusting of jurisdiction to the Justices of the Peace at their Sessions to be wondered at when it is remembered that they were entrusted by 31 Hen. VIII. c. 14 (the Statute of the Six Articles), with the punishment of offenders against that Act! At this period, and for a long time afterwards, the Justice of the Peace was a sort of judicial and administrative "jack of all trades."

In Easter Term, 23 Eliz., it was greatly doubted by many (as appears from Dyer's Reports, p. 376) whether the Act of the 13th of the Queen, c. 8, was expired by the then last session of Parliament, or stood at that time in force. The Parliament of the 13th year of the Queen ended in the same year, the five years thence finished in the 18th, in which year the second session of the Parliament, begun in the 14th year, was holden; after which second session of the said Parliament the last session of the Parliament of this 23rd year was the first session of Parliament next ensuing the five years: whether the words, *next ensuing*, had relation to the next session, or to the next Parliament? And it was holden by the Lords of the Council and the major part of the Judges, that the words ought to be referred to the next Parliament, and not to the next session. And principally the better construction was to be made for the commonweal, and it was declared by proclamation to be so taken. The statute was, from time to time, continued by 27 Eliz. c. 11, 35 Eliz. c. 7, and 39 Eliz. c. 18. Two cases upon the statute are reported in Coke's Reports, decided in Elizabeth's reign, which may here be referred to.

One was *Burton's Case*, in the King's Bench, Mich. 33 & 34 Eliz., and the other was *Clayton's Case*, in the Common Pleas, Pasch. 37 Eliz.

In *Burton's Case* it was held that an agreement that A. should lend B. 100*l.*, and that B. should grant to A. and his heirs a rent of 20*l.* on condition that if B. should

pay the 100*l.* to A. on a certain day, which was before the day on which the rent was appointed to be paid, then the said rent should cease, was not usurious.

The reasons given for the decision illustrate the difficulties which have always beset laws made in prohibition or restraint of usury. "And the cause that it was not against the Statute of Usury was, that nothing was to be paid by B., the grantor, within a year and a quarter after the grant made; for within the 17th day of July, 1579, and Christmas, 1580, no rent is appointed to be paid. And if B. had paid the 100*l.* the 17th of July, 1580, the rent should cease without anything paying for the said 100*l.* So that the Court said it was a plain bargain, and purchase conditional of such rent, and no usury. It was in the election of the grantor to have paid the said 100*l.* and to have frustrated the rent, so that the grantee (as the nature of usury is) was not assured of any recompense for the forbearance of his 100*l.* for a year, and the said rent of 20*l.* per annum is but a penalty to the grantor, and assurance to the grantee for the payment of the 100*l.* But it was resolved by the whole Court that if it had been agreed between the grantor and grantee, that notwithstanding such power of redemption, the 100*l.* should not be paid at the day, and that the clause of redemption was inserted to make an evasion out of the statute, then it had been an usurious bargain and contract within the said statute. For if in truth the contract be usurious against the statute, no colours or shows of words will serve, but the party may show it, and shall not be concluded or estopped by any deed or any other matter whatsoever; for the statute gives averment in such case" (*q*). And POPHAM, Chief Justice, said: "If A. comes to B. to borrow 100*l.*, B. lends it to him, if he will give him for the loan of it for a year 20*l.* if the son of A. be then alive, this is usury within the statute;

(*q*) This means that the statute allows the real agreement to be alleged and proved.

for if it should be out of the statute for the uncertainty of the life of A., the statute would be of little effect; and by the same reason that he may add one life, he may add many."

Clayton's Case was as follows:—R. lent C. 30*l.* on the 6th December until the 2nd June following, and then C. was to pay R. 33*l.* if the son of C. was then alive; if not, then C. was to pay but 27*l.*, and it was held to be usury.

The next Statute of Usury was 21 Jac. I. c. 17.

The preamble runs thus:—"Whereas at this time there is a very great abatement in the value of land, and other the merchandises, wares, and commodities of this kingdom, both at home, and also in foreign parts whither they are transported; and whereas divers subjects of this kingdom, as well the gentry as merchants, farmers, and tradesmen, both for their urgent and necessary occasions for the following their trades, maintenance of their stocks and employments, have borrowed and do borrow divers sums of money, wares, merchandises and other commodities; but by reason of the said general fall and abatement of the value of land, and the prices of the said merchandise, wares, and commodities, and interest in loan continuing at so high a rate as 10*l.* for 100*l.* for a year, does not only make men unable to pay their debts, and continue the maintenance of trade, but their debts daily increasing, they are enforced to sell their lands and stocks at very low rates, to forsake the use of merchandise and trade, and to give over their leases and farms, and so become unprofitable members of the Commonwealth, to the great hurt and hindrance of the same."

The statute then reduced the former rate of 10 per cent. to 8 per cent., and enacted that any person who should, after the 24th of June, 1625, take any higher rate of interest by means of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, merchandise, or any thing or things whatsoever, or by

any deceitful way or means, "or by any covin, engine, or deceitful conveyance," should forfeit treble the value of the moneys, wares, merchandises, and other things lent, bargained, sold, exchanged, or shifted.

By *sect.* 3, "And be it further enacted, &c., that all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains for contracts, who shall after the 25th June, 1625, take or receive, directly or indirectly, any sum or sums of money, or other reward or thing for brocage, soliciting, driving, or procuring the loan, or forbearing of any sum or sums of money, over or above the rate or value of five shillings for the loan or forbearing of 100*l.* for a year, and so rateably, or above twelve pence for making or renewing of the bond or bill for the loan, or forbearing thereof, or for any counter bond or bill concerning the same, shall forfeit for every such offence 20*l.*, and have imprisonment for half a year: the one moiety of such forfeiture to be to the King, and the other moiety to him or them that will sue for the same . . . by action of debt, bill, plaint, or information."

By *sect.* 5, "No words in this law contained shall be construed or expounded to allow the practice of usury in point of religion or conscience."

This statute, which was originally a temporary Act, was made perpetual by 8 Car. I. c. 4, s. 5.

By 12 Car. II. c. 13 (confirmed by 13 Car. II. st. 1, c. 14), the rate per cent. was reduced from 8 to 6 per cent., the law in other respects being re-enacted. The preamble was as follows:—

"Forasmuch as the abatement of interest from ten in the hundred in former times hath been found by notable experience beneficial to the advancement of trade and improvement of lands by good husbandry, with many other considerable advantages to this nation, especially the reducing of it to a nearer proportion with foreign States with whom we traffick; and whereas in fresh

memory the like fall from eight to six in the hundred, by a late constant practice hath found the like success, to the general contentment of this nation, as is visible by several improvements: and whereas it is the endeavour of some at present to reduce it back again in practice to the allowance of the statute still in force, to eight in the hundred, to the greater discouragement of ingenuity and industry in the husbandry, trade and commerce of this nation: Be it for the reasons aforesaid enacted," &c.

By 12 Anne, st. 2, c. 16, the rate was finally reduced from 6 to 5 per cent., the penalty for taking any higher rate of interest being "treble the value of the monies, wares, merchandises and other things so lent, bargained, exchanged or shifted," the existing law as to "corrupt bargains, loans, exchanges, chevisances, shifts, deceitful ways and means, covin, engines, or deceitful conveyances," being re-enacted.

The statute 6 Geo. I. c. 18, s. 12, with a view to secure the monopoly of marine insurance and lending money on bottomry to the two corporations whose incorporation by the Crown was designed by that Act, denounced the penalties of usury against any corporation or body politick, or persons acting in society or partnership, who should compete with such protected corporations by insuring ships at sea or lending money on bottomry, but this was not to interfere with individuals subscribing policies of marine insurance or lending money on bottomry. Marine insurances and loans on bottomry were not within the Statutes of Usury (save in so far as they were brought within them by this Act), the former because the contract of insurance was not a loan of money at all; and the latter because the principal lent was put at hazard upon the successful termination of the voyage.

By 14 Geo. III. c. 79, loans of money made in the United Kingdom upon mortgages and securities of lands, tenements, hereditaments, slaves, cattle, or other things lying and being in Ireland or in any of the colonies or

plantations, at a higher rate of interest than 5 per cent., but at rates which were lawful by the laws of the countries where such lands, &c., were situate, were declared valid.

By 58 Geo. III. c. 93, it was enacted that no bill of exchange or promissory note that should be drawn or made after the passing of that Act should, though it might have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract. Before this statute a bill of exchange or promissory note, given upon a usurious consideration was void, even in the hands of an indorsee for value without notice, which was certainly a hard case.

By 3 & 4 Will. IV. c. 98, s. 7, it was enacted as follows:—

"No bill of exchange or promissory note made payable at or within three months from the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, indorsing or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding."

By 7 Will. IV. & 1 Vict. c. 80, the foregoing exemptions as to bills of exchange and promissory notes was extended to bills of exchange and promissory notes payable within twelve months from the date thereof, or having not more than twelve months to run.

By 5 & 6 Will. IV. c. 41, every note, bill or mortgage, which, if the now stating Act had not been passed, would, under 12 Anne, st. 2, c. 16, have been absolutely void, should be deemed and taken to have been made, drawn, accepted, or given for an illegal consideration.

By 2 & 3 Vict. c. 37, "From and after the passing of this Act no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of 10*l*. sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, nor the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate drawing, accepting, indorsing, or acquiring any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking any more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: provided that nothing herein contained shall extend to the loan or forbearance of any money upon security of

any lands, tenements, or hereditaments, or any estate or interest therein."

Sect. 2. "Provided that nothing in this Act contained shall be construed to enable any person or persons to claim, in any Court of Law or Equity, more than 5 per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved of the penalties against usury, unless it shall appear to the Court that any different rate of interest was agreed to between the parties."

This Act was continued by 13 & 14 Vict. c. 56, until 1st January, 1856.

In the meantime the writings of Bentham had thoroughly undermined the Statutes of Usury. His Defence of Usury, which, it has been said by Professor Dicey (*r*), "supplied every argument which is available against laws which check freedom of trade in money-lending," was published in 1816. The effect of his teaching is apparent in the statute 2 & 3 Vict. c. 37, just quoted. Before the 1st of January, 1856, arrived, the usury laws were totally repealed by 17 & 18 Vict. c. 90, but with the following saving:—

By *sect.* 3 of this statute, "Where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not been passed."

To continue the above quotation from Professor Dicey:— "The usury laws were totally repealed in 1854, that is, thirty-eight years after Bentham had demonstrated their futility; but in 1854 the opponents of Benthamism were slowly gaining the ear of the public; and the Money-lenders Act of 1900 has shown that the almost irrebuttable presumption against the usury laws which was

(*r*) Law and Opinion in England, p. 33.

created by the reasoning of Bentham has lost its hold over men who have never taken the pains or shown the ability to confute Bentham's arguments."

The law of usury, as it stood in the 13th year of Geo. III. (1773), upon the Statutes of Usury then in force in relation to the sale and purchase of annuities, which were a common way of evading the statutes, was thus stated by Chief Justice De Grey in *Murray* v. *Harding*, 2 W. Bl. 859, in which case it was held that the purchase of an annuity for the life of the vendor (thirty-two years old) for six years' purchase, was not usurious, notwithstanding that it was made redeemable at the option of the vendor, at the end of five years, for five and a half's purchase :—

"It is essential to the nature of an usurious contract that there must be (1) a loan, (2) that illegal interest is to be paid for such loan.

"It is essential to the nature of a loan that the thing borrowed is at all events to be restored (*s*). If that be *bonâ fide* put in hazard, it is no loan, but a contract of another kind. So also, if illegal interest is to be certainly paid, or even upon a reasonable possibility, the contract is usurious.

"To evade these principles many expedients have been tried.

"(1) To make the interest precarious and uncertain; but if it be clearly a loan, the possibility of the interest becoming precarious will not signify (*Roberts* v. *Tremain*, Cro. Jac. 507).

"(2) Another way to evade has been to make the principal itself precarious. Here the question must always be, whether it is a fair and *bonâ fide* hazard? If it be not a fair but a colourable hazard, the contract will be

(*s*) Literally this is not so, for in the case of a loan of money it is not the money lent which is to be restored, but an equivalent sum, which, of course, is what the Chief Justice here meant. He is confusing "mutuum" and "commodatum."

usurious. And we may observe that as on the one hand no colour or shift will protect a really usurious loan, so on the other no inequality of price will condemn a fair and real hazard. To illustrate the former part of this rule there are many cases. *Mason* v. *Abdy*, Carthew, 67, where the chance was that a young man, in perfect health, did not live six months, the hazard was colourable and the loan usurious. Of the like nature are Cro. Eliz. 642; Noy, 151; 4 Leon. 208; 5 Coke, 70. To the other branch of the rule (inequality of price) may be applied *The King* v. *Drury*, 2 Lev. 7.

"DODDRIDGE, Justice, in Cro. Jac. 507, lays down two rules to judge of an usurious contract:—

"1. If a casualty goes to interest only and not principal, it is usury, for in all events the principal is secure; but if both are at hazard it is not usury.

"2. If both principal and interest are secured, if it be at the will of the party who is to pay it, it is not usury; as, if one lends 100*l.* to receive 130*l.* at the end of two years, or only 100*l.* at the end of one year, at the option of the borrower, as in *Lord Chesterfield's Case*, 1 Atk. 342, 350. These rules are adopted and relied upon by Lord HARDWICKE and Mr. Justice BURNETT.

"3. Communication concerning a loan has sometimes infected the case and turned a contract into usury. But then the communication must be mutual. Application for a loan is not such a case, provided the party applied to refuses a loan, but treats for an annuity. And this more especially where the party applied to is an attorney and the real seller is ignorant of the whole conversation. I know no case where even a meditated loan has been *bonâ fide* converted into a purchase, and afterwards held to be usurious. To be sure it is a very strong and suspicious circumstance, but if the purchase comes out to be clearly a *bonâ fide* purchase it will, notwithstanding, be good.

"4. Inequality of price is also a suspicious circumstance, especially if very inadequate. But this of itself will not make any contract usurious, though it may upon circumstances make it unfair and unconscientious, and as such relievable in equity.

"5. If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, as in the case of *Lawley* v. *Hooper*. But that alone will not be conclusive.

"6. Another circumstance is the form of the instrument. If that imports a loan, and it was so meant, the contract may become usurious. At the same time, if the transaction be *bonâ fide*, the blunder of an agent shall not make it otherwise (Cro. Jac. 678).

"7. Subsequent acts of the parties may also be material evidence of intention, unless properly cleared up and explained.

"In the present case the principal is precarious, and secured only by the life of a clergyman and his continuing to be beneficed. The communication concerning the loan was only an application *ex parte* to an attorney, who refused it, the principal party being totally a stranger to it. The price comes out to be a fair market price for the annuity, or at least to be very little under it. The clause of redemption is entirely at the option of the seller, and affords him an opportunity of purchasing back the annuity at a price somewhat less than he took for it, in case at the end of five years he finds by his constitution, &c., he has made a disadvantageous bargain."

The law as it stood in 1845, shortly before the repeal of the usury laws, is stated in the notes to *Ferrall* v. *Shaen*, Pasch. 21 Car. II., in Williams' Saunders, 5th ed., p. 291 (*t*).

In order to avoid a bond for usury the plea of the defendant had to state a usurious contract at the time of

(*t*) The authorities for the law as stated in the notes are there cited. I do not propose to cite them here.

the bond, and that it was made pursuant to such usurious contract; for if it were legal at that time no subsequent event could make it usurious. Accordingly, if the lender contracted for greater interest than the statute allowed, so that the agreement was corrupt at the time of the loan, all the assurance was void; but if he contracted for no more than the statute allowed, but afterwards, upon a subsequent agreement, took more, the assurance was not void, but the party forfeited the treble value.

The question whether the party had subjected himself to the penalty of the statute was a question distinct from whether the instrument was avoided. In order to subject himself to the penalty it was necessary not only to stipulate for usury, but actually to receive it; so that although the instrument might be avoided by the statute, the party might not have rendered himself liable to the penalty. Accordingly the right of action for the penalty commenced to run, not from the making of the contract, but from the receipt of the usurious interest. The action, which was *qui tam* by an informer, had to be brought within a year (31 Eliz. c. 5, s. 5). Where a premium was actually paid at the time of the contract, and 5*l.* *per cent.* was agreed to be paid, the offence was complete on the receipt of any part of the interest, and any subsequent receipt of interest did not amount to a second offence. A fresh security given for the balance of a debt originally usurious was equally void with the original security. But if the original usurious agreement or securities were cancelled by mutual consent and a new agreement were entered into, or new securities given for the debt and legal interest only, all the usurious items being struck out, such new agreement was binding.

By reason of the similarity of the wording of the Statutes of Usury enacted subsequently to 13 Eliz. c. 8, to the provisions of that statute, a similarity which the reader will already have perceived, all the cases in the books upon the subject of usury, since the Elizabethan

statute, applied to all the later statutes. All the statutes contained saving clauses saving pawnbrokers from their operation. The interest which pawnbrokers might take was fixed by 24 Geo. III. st. 2, c. 42 (1784). The earlier statutes relating to pawnbrokers (1 Jac. I. c. 21, and 30 Geo. II. c. 24), had left them, so far as interest and charges were concerned, to the operation of the Statutes of Usury. No account of the usury laws would be complete without some notice being taken of the various devices which men at all periods, whilst those laws were in force, had recourse to in order to evade them. Some of these devices have been already mentioned. When usury was left to Ecclesiastical censures only, the "mort-gage" as described by Glanvill, although it would seem to have been to a certain extent lawful, was undoubtedly in effect usurious, for under it the gagee took the profits of the land without accounting, and without the principal money owing being thereby diminished. "When an irremoveable thing is put into pledge, and seisin of it has been delivered to the creditor for a definite term, it has either been agreed between the creditor and debtor, that the proceeds and rents shall in the meantime reduce the debt (*u*), or that they shall in no measure be so applied (*x*). The former agreement is just, the other unjust and dishonest, and is that called a mort-gage, but this is not prohibited by the King's Court, although it considers such a pledge as a species of usury (*y*). Hence, if anyone die having such pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the effects of a usurer (*z*). Pollock and Maitland tell us that Christians in those days "were very willing to run such risk of sin and punishment as was involved in the covert

(*u*) "Vivum vadium."

(*x*) "Mortuum vadium."

(*y*) But the King's Courts would not protect the seisin of the gagee if he were disseised either by a stranger or by the gagor himself (Pollock and Maitland, 1st ed., vol. i., p. 119).

(*z*) Glanvill, Book 10, c. 8.

usury of the mortgage" (*a*). Probably at a later time when the Common Law Courts assumed jurisdiction to punish living usurers, this particular form of security soon became less common if not wholly obsolete.

A better and more popular way of getting an increase for the use of money, which would seem not to have been considered usury, but which savoured strongly of usury in effect, was the system of paying a sum of money as consideration for the grant of a beneficial lease for a term of years. This was a common transaction (*b*). If such a lease were made subject to a condition to be void upon the lessor paying to the lessee a sum of money not less than the original premium paid for the lease, the transaction would very closely approximate to a loan at interest secured by the term; the only differences would be that the lender would not be able to sue the borrower for repayment of the money advanced, and the annual income would not be interest at a fixed rate, but would vary with the annual yield of the land demised. Ecclesiastical persons seem to have had no qualms of conscience on the subject of purchasing beneficial leases, and thus securing to themselves a profitable return for their outlay. The following half-dozen illustrations of devices to obtain more than lawful interest, and accordingly held usurious, are taken from Comyns' Digest (*c*).

(1) Lender retaining in his hands part of the money purported to be advanced for the borrower to take up at some future time, the legal rate of interest running meanwhile upon the whole sum nominally advanced. Held *usurious*. *Aliter* if nominal amount actually advanced and handed back by borrower to lender to keep for him as his banker to be drawn on from time to time as needed.

(2) Beneficial lease granted at the same time with a

(*a*) 1st ed., vol. i., p. 118.

(*b*) See Pollock and Maitland, 1st ed., vol. ii., p. 110.

(*c*) Comyns' Digest, "Usury." The authorities will be found there cited.

loan of money by lessee to lessor, thus affording to the lender a profit beyond the interest. Held *usurious*. In order to support such a transaction, it must have been proved "that the lease was contracted for wholly independent of, without any regard to, and unconnected with a loan or treaty, or communication for a loan of money."

(3) Contract for a lease to be granted by mortgagor to mortgagee in consideration of forbearance. Held *usurious*.

(4) Stipulation in a mortgage for the mortgagee to act as receiver at a commission. Held *usurious*.

(5) Contract for repayment of a debt with legal interest, or at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable. Held *usurious*, the principal and interest being secured, with a chance of a rise of the stock: not therefore like a contract to replace stock absolutely which might fall.

Generally as to the various shifts and devices by which the usury laws were evaded in Bentham's day, the reader is referred to that writer's Defence of Usury.

We have already seen that the sale and purchase of annuities was a fertile method of evading the usury laws. *Post-obit* bonds were also held not to fall within the Statutes of Usury, but they did not escape the jurisdiction of Courts of Equity to set aside and restrain "catching bargains with expectant heirs." A reference to them will be found in Part II., in the notes to sect. 1 (1) of the Money-lenders Act, 1900.

PART II.

THE MONEY-LENDERS ACT, 1900

(63 & 64 Vict. c. 51).

An Act to amend the Law with respect to Persons carrying on business as Money-lenders.

[8th August 1900.]

Be it enacted, &c.

Re-opening of transactions of money-lender.

1.—(1) Where proceedings are taken in any court by a money-lender (*a*) for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settle-

(*a*) "Money-lender" is defined by sect. 6.

ment of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

INTEREST EXCESSIVE: TRANSACTION HARSH AND UNCONSCIONABLE.

Wilton v. *Osborne*.

In *Wilton* v. *Osborne* (*b*), which was the first reported case decided under the Act, RIDLEY, J., after consultation with several other Judges (*c*), held that in order to entitle the borrower to relief it was necessary that the transaction should be such that a Court of Equity would relieve against it on the ground of its being harsh and unconscionable. This result was arrived at by construing the words "harsh and unconscionable" as expressive of the grounds upon which Courts of Equity before the Act would have granted relief, and by reading the words "or otherwise such that a Court of Equity would give relief" as merely added in order to give completeness to the definition.

(*b*) [1901] 2 K. B. 110.

(*c*) So stated by CHANNELL, J., in *Barnett* v. *Corumna*, The Times, 16th June, 1902.

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CHANNELL, J., agreed with this view (*d*), and decided accordingly the unreported case of *Barnett* v. *Corunna*, already referred to in note (*c*).

Overruled by *In re A Debtor*.

This view of the Act, however, did not commend itself to the Court of Appeal, which, in *In re A Debtor* (*e*), overruled *Wilton* v. *Osborne*, and laid it down that under this Act a transaction with a money-lender can be re-opened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not such as a Court of Equity would have given relief against before the Act (*f*).

Principle of Act stated by VAUGHAN WILLIAMS, L.J.

VAUGHAN WILLIAMS, L.J., thus stated the principle of the Act in *Poncione* v. *Higgins* (*g*):—

> "The intention of the Legislature was to deal with cases of persons in financial distress coming to money-lenders to borrow money in order to get out of their financial distress which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the money-lender" (*h*).

Distinctions to be observed:

In considering whether in any given case the rate of interest is "excessive" or the transaction "harsh and unconscionable," certain broad lines of distinction are to be drawn.

(1) Distinction between secured and unsecured loans.

(2) Borrower —whether or not competent and independent.

One leading distinction is between secured and unsecured loans; and this distinction is clearly recognised in the cases which have been decided under the Act. Another distinction is personal to the borrower—whether he was an intelligent and competent man able to understand the matter in hand and to appreciate the terms of the bargain, and so circumstanced that he was in a

(*d*) See judgment of this learned Judge in *Carrington* v. *Smith*, App. F.

(*e*) [1903] 1 K. B. 705.

(*f*) See *post*, *sub tit.* "Such that a Court of Equity would give relief."

(*g*) 21 T. L. R. 11.

(*h*) *Saunders* v. *Newbold*, [1905] 1 Ch. 260, which is considered hereafter, seems, however, difficult to reconcile with this.

position to bargain with the money-lender on fairly equal terms, or a person falling short of such a standard? For this also there is authority in the decisions under the Act. A third distinction must be made between cases where no element of fraud, misrepresentation, or undue pressure is present, or any unconscionable circumstance other than the driving of a usurious and hard bargain on equal terms, and cases in which some such circumstance is present. For this also there is authority.

(3) Presence or absence of some unconscionable element.

The author ventures to suggest yet another distinction for the consideration of the profession, namely, between first transactions and renewals, which distinction does not appear as yet to have been emphasised in any reported case. It is proposed to discuss the decided cases under headings corresponding with the three first above-mentioned distinctions, and then to offer what the author trusts may be regarded as good and sufficient reasons for the above suggested fourth distinction.

(4) First transactions and renewals.

(1) *Of the Distinction between Unsecured and Secured Loans.*

Distinction between secured and unsecured loans discussed.

The necessity for making this distinction is caused by the difference in character between secured and unsecured loans in regard to the risk run by the lender. The Court, in cases falling within the Act, is empowered "to relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, *having regard to the risk*, and all the circumstances, may adjudge to be reasonable."

As the usury laws did not apply (*i*) where the principal sum was *bonâ fide* hazarded (though the chance that the borrower might not be of ability to pay was not counted as a hazard for the purpose of taking a case out of the Statutes of Usury), so the risk of the borrower's insolvency

(*i*) See Part I.

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is directly relevant to the rate of interest which may fairly be exacted for the loan. The value of a security is generally capable of being appraised with more or less approximate accuracy, but the solvency of a borrower, having nothing but his personal security to offer, must always, or at any rate nearly always, be a doubtful question. If Lord MACNAGHTEN gave utterance to a truth when he said that "it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd" (*k*), is it not as true to say that it is as easy to estimate the financial ability of a crowd as to gauge the solvency of an individual? Assurances given as to their financial position by men whose occasions are so urgent as to force them to obtain accommodation at ruinously high rates of interest are notoriously unreliable, and the sources of authentic information which are generally open to a money-lender, *e.g.*, the Registries of Bills of Sale and of County Court Judgments, if they contain nothing indicative of the borrower's embarrassment, are at best nothing more than purely negative in character. KEKEWICH, J., in *Saunders* v. *Newbold* (*l*), mentioned as one of the grounds of re-opening the transaction in that case that if the money-lenders had chosen to make inquiries at the borrower's bankers they would have discovered that the borrower's position was such that lenders of far larger sums than they contemplated lending would run no risk whatever. Whatever force there may have been in this observation in relation to the very peculiar facts of that case, it can scarcely have been intended to be of general application, for in almost every case one would suppose that the borrower would strongly resent any such inquiry being made, and would, indeed, probably regard it as a gross breach of faith. A man who has a bank account is not usually

Lord MACNAGHTEN'S *dictum* in *Salomon* v. *Salomon*.

Suggested duty of money-lender to make inquiries discussed.

(*k*) In *Salomon* v. *Salomon*, [1897] A. C. at p. 53.

(*l*) See per VAUGHAN WILLIAMS, L.J., in [1905] 1 Ch. 274, who quotes the observation as it would seem with approval.

likely to have recourse to a money-lender until he has exhausted such accommodation as his banker is willing to give him, and his banker, one would think, would be the last person whom the average borrower would wish to know that he was having recourse to money-lenders.

However this may be, the difference in the risk in the case of unsecured and secured loans is obvious, and the practical difficulty of declaring any rate of interest upon an unsecured loan to be excessive has been very clearly put by many Judges in many cases. DARLING, J., in *Samuel* v. *Miles* (*m*), and CHANNELL, J., in *Carringtons, Ld.* v. *Smith* (*n*), have expressed themselves upon this subject in terms which are worthy of quotation. The first-named Judge in *Samuel* v. *Miles* said:—

DARLING, J., as to "excessive."

> "I do not think the rate of interest can be said to be excessive, because I really do not know what standard to set up. If a person lends money upon no security at all I do not know what would be the normal interest—I cannot find out. If I cannot find out the normal interest, I cannot find out what would be the excessive interest. I have nothing to judge it by, therefore I cannot say that it is excessive in the circumstances. If he had asked him to lend him money at 55 per cent. and deposited with him Consols, one could easily have said: 'It is excessive, because the security is so good'; but here there is no security."

CHANNELL, J., in *Carringtons, Ld.* v. *Smith* said:—

CHANNELL, J., as to "excessive."

> "The difficulty is that the words are so vague. 'Harsh and unconscionable' are not easy words to construe when the rules of the Courts of Equity have been put out of consideration, but they are at any rate used to describe some conduct of the money-lender (*o*),

(*m*) App. H.

(*n*) App. F.

(*o*) But this must be read in conjunction with the *dicta* of COLLINS, M.R., and COZENS-HARDY, L.J., in *In re A Debtor*, [1903] 1 K. B. at pp. 709 and 711, respectively, to the effect that excessive interest alone

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and it may be easy enough in many cases to say whether or not his conduct can be fairly described by those epithets. There is much greater difficulty, as it seems to me, in the word 'excessive.' It is a relative word—exceeding what? Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them, and telling us what is to be the *maximum* of lawful interest."

Can merely "excessive" interest render a transaction "harsh and unconscionable"?

May the interest, however, be so excessive as of itself, and without any other circumstance, to render a transaction harsh and unconscionable?—There are *dicta* which are entitled to the highest respect, but as it would seem no actual decision in the affirmative; whilst there is a weighty considered judgment of CHANNELL, J., in the negative.

The *dicta* are of COLLINS, M.R., in *In re A Debtor*, [1903] 1 K. B. 705, and of COZENS-HARDY, L.J., thrice repeated, viz., in *In re A Debtor*, at p. 711; in *Wells* v. *Allott*, [1904] 2 K. B. at p. 848; and in *Poncione* v. *Higgins*, 21 T. L. R. p. 12.

COLLINS, M.R.

In *In re A Debtor* COLLINS, M.R., at p. 709 said:—

> "Relief may be given if the bargain is harsh and unconscionable, by reason of excessive interest, or other excessive charges."

And again, later, at the same page:—

> "I will not say that under this section the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable, even as against a borrower who was of full age and who stood in no special relation to the lender."

may render a transaction "harsh and unconscionable"; and with the *dictum* of COZENS-HARDY, L.J., to the same effect in *Wells* v. *Allott*, [1904] 2 K. B. 842, and in *Poncione* v. *Higgins*, 21 T. L. R. 11, *post*.

In the same case COZENS-HARDY, L.J., said :— COZENS-HARDY, L.J.

> "I should be sorry to say that the rate of interest charged and the other charges might not be so excessive as for that reason alone to render the transaction 'harsh and unconscionable.'"

In *Wells* v. *Allott* (*ubi sup.*), COZENS-HARDY, L.J., said:—

> "Where the interest appears on the face of the transaction to be excessive, whether it is 100 per cent. or less, the further inquiry has to be undertaken, namely, whether the interest is so excessive as to make the transaction harsh and unconscionable."

And in *Poncione* v. *Higgins* (*ubi sup.*), COZENS-HARDY, L.J., said :—

> "It was possible that the interest might be deemed excessive, and yet the transaction might not be deemed harsh and unconscionable; and it was possible that the interest might be deemed so extravagantly excessive as alone to satisfy the Court that the transaction was harsh and unconscionable."

To what extent are these sayings binding as authority? The question would not seem to be altogether easy to answer with confidence. The *dicta* of COZENS-HARDY, L.J., in *Wells* v. *Allott* (*ubi sup.*) and *Poncione* v. *Higgins*, may fairly be treated as *obiter*, for in neither of those cases were such *dicta* necessary to the decision. *Wells* v. *Allott* merely decided that where the interest is challenged by a defendant under Order 14 as being excessive, and such defendant claims relief under the Act, the question of relief cannot be dealt with by the Master or Judge in Chambers under Order 14 (*p*); and in *Poncione* v. *Higgins* there were special circumstances which made that case clearly a case for relief, apart from the question of excessive interest. For one thing, the case belongs to the class of secured loans; and for another thing, the fiduciary relation of agent and principal existed between

(*p*) See *post*, "Order 14."

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lender and borrower. The borrower, moreover, was "a foolish woman." The expressions of opinion, however, by COLLINS, M.R., and COZENS-HARDY, L.J., in *In re A Debtor* would not seem to fall so clearly within the category of mere *dicta*.

CHANNELL, J.

CHANNELL, J., in his considered judgment in *Carrington, Ld.* v. *Smith*, treats these expressions of opinion as merely *dicta*. He says:—

> "In *In re A Debtor*, the actual decision was merely that 'harsh and unconscionable' was not limited to such cases as a Court of Equity before the Act would have held to be harsh and unconscionable. The Master of the Rolls, however, and COZENS-HARDY, L.J., each say that under this section the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. . . . It may be observed that these expressions of opinion as to the possible consequences of 'so excessive' interest are at present *dicta* only. Further they are *dicta* in cases where the question was whether there should be further investigation, and not where the facts were ascertained and the question was what decision should be given on them."

In re A Debtor discussed.

The difficulty which the writer feels about accepting CHANNELL, J.'s view of the expression of opinion in *In re A Debtor*, is that, according to the report of that case in the Law Reports, the only ground which had been put forward by the judgment debtor before the Registrar in Bankruptcy, as a reason for going behind the judgment, was that the interest charged was excessive, and that this circumstance alone entitled him to relief. The learned Registrar had rejected this contention, on the ground that he was bound by *Wilton* v. *Osborne* (*ubi sup.*) to do so, and had made a receiving order. It was against this receiving order that the appeal was brought. The Court of Appeal set aside the receiving order and sent the petition back to the Registrar, in order that he

might consider whether relief ought to be granted. Relief on what grounds? *Semble*, on the one and only ground which had, according to the report, been urged before the Registrar in the first instance. If this ground was, as reported, only that the interest was excessive, does not the judgment of the Court of Appeal setting aside the receiving order amount to an actual decision that excessive interest may in itself render a transaction "harsh and unconscionable"? And, if so, can it be correct to describe the expressions of opinion in question as merely *dicta*?

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Another difficulty with which the writer feels much pressed is the following: The decision of the Court of Appeal in *In re A Debtor* compels us to recognise that the Act goes beyond the jurisdiction and doctrines of Courts of Equity and grants relief in cases in which the Chancery Division before the Act would have refused it. Having regard to the doctrines of equity as understood by the writer (*q*), it appears extremely difficult to say in what the distinction between relief under equitable doctrines and relief under the Act consists, if it does not consist in the mere hardship of the bargain in point of "excess" of interest.

CHANNELL, J., in his considered judgment in *Carrington, Ld.* v. *Smith* (*ubi sup.*), upon the question now under consideration said:—

CHANNELL, J., continued.

> "'Harsh and unconscionable' are not easy words to construe when the rules of the Courts of Equity have been put out of consideration, but they are at any rate used to describe some conduct of the money-lender, and it may be easy enough in many cases to say whether or not his conduct can be fairly described by those epithets. . . . It seems that the Court is to make an adjudication as to what interest, having regard to the risk and all the circumstances, is reasonable, and then if the interest charged is in excess of that amount, it seems that it is

(*q*) *Post.*

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excessive within the meaning of that word as used earlier in the section. This task would often be a difficult one, but amongst 'all the circumstances' which the Court is to take into consideration, surely the fact that the borrower has thoroughly understood the transaction, and, knowing all the facts much better than the Court can possibly do, has been quite willing to pay the interest asked, is one of the circumstances which the Court must consider. Often the Court will not have that circumstance to guide it. The borrower is frequently ignorant, sometimes imposed upon; frequently in such straits that he has no alternative, but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be no real guide to the Court. But in the case before me there is nothing, unless the Act of Parliament forbids it, to prevent my saying that the defendant knew much better than I do what it was reasonable for him to pay for the accommodation he wanted. . . . Why should I say that he was unreasonable in what he did, when he, an intelligent man, must know his affairs better than I do?"

The learned Judge then discussed the cases *In re A Debtor* (*ubi sup.*), *Wells* v. *Allott* (*ubi sup.*, as to which he observed that he did not find in the report that the Lords Justices committed themselves to the view that the question at the trial would be as stated in the head-note, "whether the interest was so excessive as to render the transaction harsh and unconscionable"), and *Poncione* v. *Higgins*, expressing the view as to them which has already been referred to. He then quotes JOYCE, J., in *Part* v. *Bond* (*r*) (referred to *infra*), and continues:—

"There is, perhaps, something like a market rate of interest for loans on security, but I do not see how there can be any rate for loans on a promissory note without security, and I hardly think the Judge (JOYCE, J.) would

(*r*) 21 T. L. R. 553.

have referred to 10 per cent in reference to such loans. Practically I think any test as to interest being ordinary or extraordinary (*s*) is for the purposes of the Act out of the question, except, perhaps, in cases of loans on security. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality, a Judge cannot, I think, do better than adopt what they themselves have agreed on, although, of course, when that is not the case, he has to adjudge what is reasonable as best he can under all the circumstances. . . . The conclusion at which I arrive is that the Judge is entitled to consider, amongst 'all the circumstances of the case,' the fact that the borrower thoroughly understood the transaction, and, without any misrepresentation or any pressure other than the mere request to pay so much interest, voluntarily agreed to pay it; and I think that when the Judge finds those to be the facts he ought to find that the interest which the man so agrees to pay is reasonable, and therefore not excessive within the meaning of the Act."

VAUGHAN WILLIAMS, L.J.

VAUGHAN WILLIAMS, L.J.'s view would appear to be the same as that of CHANNELL, J. See his statement of the principle of the Act in *Poncione* v. *Higgins*, already quoted *ante*, p. 36.

JOYCE, J.

The passage from the judgment of JOYCE, J., in *Part* v. *Bond*, which received the adherence of CHANNELL, J., and which supports that learned Judge's view, is as follows :—

> "With regard to the rate of interest . . . if an excessive rate of interest be obtained merely through the folly or weakness of the borrower, or his urgent necessity, real or imaginary, with knowledge on the part of the lender such as he must possess, then in my opinion the transaction is harsh and unconscionable."

KEKEWICH, J.

KEKEWICH, J., in *Bonnard* v. *Dott* (*t*) expressed himself in terms which indicate that he would agree with the

(*s*) This was the test proposed by JOYCE, J., in *Part* v. *Bond*.
(*t*) 21 T. L. R. 491.

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dicta of COLLINS, M.R., and COZENS-HARDY, L.J., rather than with the principles laid down by CHANNELL, J., if it were to fall to him to decide between the conflicting views. *Bonnard* v. *Dott* was a case in which the borrower had given to the lender shares by way of bonus in respect of each transaction of loan and of renewal. Although these shares were not given by way of security, but by way of bonus, the case, for present purposes, is more like cases of secured than of unsecured loans, because the bonuses being of shares of some value, were capable of being weighed in the scale against the risk of the money lent being lost (*u*). The real ground of decision, however, was that the transactions were harsh and unconscionable upon other grounds. KEKEWICH, J., said:—

> "I recognise a difficulty which may press on others more than myself in the construction of the word 'excessive.' It may be said to connote a *datum* point or line, and as I am unable to fix any such point or line it may be said that there is none which is capable of being exceeded. But I have no hesitation in holding that the transactions were [for other reasons] harsh and unconscionable, and that therefore they ought to be re-opened."

BUCKLEY, J., in *Carringtons* v. *Valerie*.

BUCKLEY, J., in *Carringtons* v. *Valerie* (*x*) re-opened a transaction and allowed the money-lender only the amount actually advanced by him with interest at 20 per cent. It is to be observed, however, that in this case there had been a compound renewal (*y*), and in that respect the case differed from the case of a first transaction. The transactions which were re-opened had, moreover, been preceded

Observations on this case.

(*u*) Although the value of the shares at the time when they were given could not be fixed, they were worth 15*s.* each at the time of action brought, and they must always have had a considerable speculative value.

(*x*) 16th May, 1905. Unreported, but noted Vol. 119, Law Times Journal, at p. 62.

(*y*) See this term defined, *post*.

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by a usurious transaction between the parties which had only very recently been closed by payment; and the money-lender was, therefore, in a measure responsible for the borrower's impecunious condition. The grounds of the judgment do not appear in the report.

Facts in *Carringtons* v. *Valerie.*

The material facts were as follows:—On the 23rd March, 1904, Carringtons, who were money-lenders within the meaning of the Act, advanced 250*l.* to V., a physician and surgeon, on a promissory note for 300*l.* repayable by three monthly instalments of 20*l.* on the 23rd April, the 23rd May, and the 23rd June, and the balance of 240*l.* on the 23rd July, with the usual default clause. C. was aware that V.'s one-third share of a medical practice was worth from 600*l.* to 700*l.* per annum, and that he also had furniture in his house to the value of about 150*l.* (*z*). V. duly paid off the whole of the 300*l.* by the 24th July (*a*).

On the 13th August, 1904, C. advanced a further sum of 125*l.* to V. on a promissory note for 150*l.*, payable by three monthly instalments of 10*l.* on the 13th September, the 13th October, and the 13th November, and the balance of 120*l.* on the 13th December. V. duly paid the first instalment, and on the 5th October C. made a further advance of 200*l.* in cash and cancelled the note and took a fresh promissory note for 500*l.* (*b*) paid by five consecutive monthly instalments of 50*l.* each, the first to become payable on the 5th November, and the balance of 250*l.* on the 5th April, 1905, with the usual default clause. V. duly paid the first instalment of 50*l.* and then made default.

BUCKLEY, J., re-opened the two last transactions and allowed V. to escape on payment of 265*l.* with interest at 20 per cent.

Secured Loans.—Secured loans stand upon an altogether

(*z*) The report says nothing as to V.'s liabilities.
(*a*) *Semble*, this transaction was not impeached.
(*b*) This is the compound renewal referred to.

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different footing from unsecured loans. If the security given is ample and known to be so, and of a kind readily realisable in the open market, anything over 5*l.* per cent. might very well be considered "excessive," the lenders' risk being practically *nil*. On the other hand, a so-called security may be of such doubtful or contingent value, or so difficult of realisation, or so disproportionate to the amount of the loan, that it may be necessary to treat the loan as being either wholly or in a great measure unsecured. In the latter case it might be found that the proper mode of dealing with the matter would be to treat so much of the loan as was not covered by the security as unsecured, apportioning the agreed interest accordingly, and treating as "excessive" so much of the agreed interest as might be attributable to the secured part of the loan, and as it might be necessary to treat as "excessive," leaving so much as might be attributable to the unsecured part of the loan undisturbed. It is obvious that no more can be done towards laying down a rule for guidance in such cases than to insist upon the distinction between secured and unsecured loans being always kept steadily in view. Between the wholly unsecured loan and the fully and satisfactorily secured loan, there is room for an infinite variety of partially secured loans, and all that can be said is that the Judges before whom claims for relief in respect of such transactions may come must do the best they can to administer a law which leaves the matter so largely to their discretion.

Personal security of two or more persons.

Loans upon the joint or joint and several promissory note, or other personal security, of two or more persons, are not easy to classify.

Should they be regarded as secured or unsecured loans? Probably this question is not capable of being answered more satisfactorily than by the suggestion which the writer ventures to make, that transactions of this sort range themselves alongside loans partially or not satisfactorily secured. On the one hand, a sufficiency

of reasonably good names affords for business purposes a practically satisfactory security; whilst on the other hand the principle laid down by CHANNELL, J., in *Carringtons, Ld.* v. *Smith* (*ubi sup.*), as to the only possible test in the case of parties dealing together on even terms and without any unconscionable conduct on the part of the lender, other than his driving a hard and usurious bargain, seems to apply with at least equal force to the case of two or more borrowers as to that of one only. The opportunity of conferring together which two or more intending borrowers would often have would be a circumstance of considerable weight in determining whether any given transaction was harsh and unconscionable.

Where bonus shares taken.

Another case suggested and illustrated by *Bonnard* v. *Dott* (*ubi sup.*), which does not fall under either category, but which would seem to approximate more nearly to secured than to unsecured loans, is the case of a lender taking his borrower's personal security for repayment of the money advanced, with or without interest, but taking bonuses in fully-paid shares or other things. If A. lends B. 100*l.*, and B. gives A. a bonus of shares worth 100*l.*, it is clear that A. really does not risk his principal any more than he does if, instead of taking the shares by way of bonus, he takes them, or anything else of equivalent value by way of security. Probably the principal difficulty which will be experienced in cases of this class will be to ascertain the value of the shares, or other valuable consideration given as bonus, at the date of the transaction.

Bonnard v. *Dott.*

As *Bonnard* v. *Dott* shows, if any authority were needed for such a plain proposition, it is not the value which shares may afterwards go to, but their value at the date of the impugned transaction which must be had regard to.

The relative knowledge, or means of knowledge of the parties as to the nature and value of the shares given as bonus must also, in most cases, constitute an important factor in the case. There is this great distinction to be observed between the transfer or deposit of shares as

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security for payment of the amount agreed to be paid, and cases of this class, that where shares are given as security they are redeemable on payment of the amount agreed to be paid, whilst if given as a bonus they become the absolute property of the lender in any event.

Part v. *Bond*.

In *Part* v. *Bond* (*c*) the borrower was a lady, who had a life interest in settled funds which produced 1,250*l*. a year. She had already borrowed 4,000*l*. from an insurance office, which was secured by a first mortgage and a policy of insurance on her life, which she had effected for the purpose of that transaction and which was included in the mortgage. This charge involved payments of 650*l*. a year, and she was thus left with 600*l*. a year free income. The defendants lent her 1,000*l*. on security of a second mortgage of her life interest bearing interest at 45 per cent. per annum. On the defendants pressing for repayment, the plaintiff, through her solicitors, was able to obtain a further advance of 2,500*l*. from the insurance office at 5½ per cent., out of which she paid off the defendant's mortgage, and then brought her action for relief.

JOYCE, J., gave relief upon the footing of 10*l*. per cent. interest. In giving judgment he said:—

> "There is no indication in the Act as to what is an excessive rate of interest, or as to what is harsh and unconscionable. Conduct may be harsh, and I think that the defendant's solicitors' conduct might be so termed having regard to the way in which the security was enforced (*d*). As to the rate of interest, if it were

(*c*) 21 T. L. R. 553.

(*d*) The writer submits that harsh conduct in enforcing or seeking to enforce the security is not the sort of harshness which the Act points to. It is submitted that harsh conduct within the Act must be harsh conduct in bringing about the transaction and in obtaining the security or contract. Once properly obtained, the right to it cannot be impaired by proceedings being instituted to enforce the lender's rights, even if such proceedings are carried on with the utmost rigour of the law. Harshness in pursuing legal remedies does not, however, predispose the Court in the money-lender's favour in any question which may arise.

much above 10*l.* per cent. upon a reasonably safe security that would be excessive, and if it was obtained through the weakness or folly or urgent necessity, real or imaginary, of the borrower, and the lender had knowledge that it was so, the transaction might be termed harsh and unconscionable. In this case it cannot be said that there is any right to relief apart from the Act (*dd*). The borrower is a lady, and certainly not a wise one. On the whole, I am of opinion that the rate of interest was excessive, and further that, having regard to all the circumstances, the transaction was harsh and unconscionable, and the plaintiff is entitled to relief under the Act."

Victorian Daylesford Syndicate v. *Dott.*

In *The Victorian Daylesford Syndicate, Ld.* v. *Dott* (*e*) the defendant held security, but the case does not throw much light upon the application of the Act to secured loans, as the plaintiff succeeded on grounds which had no relation to the nature or value of the security held by the defendant.

The two cases just referred to are the only reported cases under the Act with which the writer is acquainted, which have dealt with secured loans.

(2) *Of the Distinction between a Borrower who is an intelligent and competent Man, able to understand the Matter in hand and to appreciate the Terms of the Bargain, and so circumstanced that he is in a Position to bargain with the Money-lender on fairly equal Terms, and a Borrower who in many respects falls short of such a Standard.*

It is only the man of full age, and of fair average competence to safeguard his own interests, who thoroughly understands the transaction, and who stands in such a relation to the money-lender that he is in a position to bargain with him on terms as fairly equal as can be looked for between a man desirous of borrowing and

(*dd*) The writer ventures to doubt this. He inclines to the view that the lady would have been relieved in equity (*ante*, pp. 41, 42).

(*e*) [1905] 2 Ch. 624.

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a lender willing to lend if he can drive a sufficiently profitable bargain, that the principles enunciated by DARLING, J. (*f*), and CHANNELL, J. (*g*), apply. "The weakness of the borrower, or his urgent necessity, real or imaginary, if known to the lender" (per JOYCE, J., in *Part* v. *Bond* (*h*)) may render the transaction harsh and unconscionable. "The borrower," says CHANNELL, J. (*i*), "is frequently ignorant, sometimes imposed upon, frequently in such straits that he has no alternative but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be no guide." A woman, "not a wise one," as was the plaintiff in *Part* v. *Bond* (*k*), must be dealt with on lines of some indulgence, as compared with a man of reasonable firmness and competence relative to the matter in hand; and a man such as the plaintiff in *Bonnard* v. *Dott* (*l*), whose description of himself in his correspondence with the defendant, which the Judge accepted as correct, was "rapless" (*m*), "helpless," "simply in despair," and "beside himself," when in the hands of a lender keen to take advantage of his situation, is also entitled to special consideration.

The following passage from the judgment of KEKEWICH, J., descriptive of the relative positions of borrower and lender in *Bonnard* v. *Dott*, describes a relation which is not uncommon, and which, wherever it is found to exist, cannot fail to render insecure any loan transactions between them :—

> "It goes without saying that when once these two men were brought together, one was entirely under

(*f*) In *Samuel* v. *Miles*, App. H.
(*g*) In *Carringtons, Ld.* v. *Smith*, App. F.
(*h*) 21 T. L. R. 553.
(*i*) In *Carringtons, Ld.* v. *Smith*, App. F.
(*k*) 21 T. L. R. 553. (*l*) 21 T. L. R. 491.
(*m*) This particular expression is not given in *The Times* report. The writer has taken it from the shorthand notes.

the influence and control of the other. It was the business of the defendant to keep the plaintiff afoot, and it was the urgent need of the plaintiff to be kept afoot on any terms. It was, of course, quite possible for the business of lending and borrowing to be transacted between them on fair terms, but the temptation on the one side to exact harsh terms was great, and there would be no power of resistance."

Poncione v. *Higgins* (*n*) affords another illustration of a lady greatly distressed for money not being regarded as standing on equal terms with the lender. VAUGHAN WILLIAMS, L.J., in this case said that the Legislature threw upon the money-lender who chose to advance money to persons in a position of financial distress the obligation not to take advantage of their distress or of their incapacity to negotiate. ROMER, L.J., said that the position of the defendant cast upon him certain obligations and duties towards the plaintiff, especially as he knew that she was relying upon him, and was a foolish woman not protected by an independent solicitor. But this case was complicated by the circumstance that the lender had taken upon himself to act as agent for the borrower, and had thus assumed a fiduciary relation towards the plaintiff.

Poncione v. *Higgins.*

In *Saunders* v. *Newbold* (*o*) the borrower was a man whose business capacity had become impaired through habits of intemperance; but as this was not noticeable by an ordinary observer, and the money-lenders, in fact, thought that they were dealing with a competent person, the borrower's incapacity to protect his own interests did not form a ground of decision. A lack of mental strength or other falling short in some personal respect of the normal standard of intelligence and capacity, although not amounting to a disability to contract for the purposes of the ordinary law of contract, may nevertheless, if

Saunders v. *Newbold.*

(*n*) 21 T. L. R. 11.
(*o*) [1905] 1 Ch. 260.

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known to (*p*) and taken advantage of by the lender, make the transaction harsh and unconscionable. But it is submitted that any mental incapacity, if unknown to the lender, will not render a transaction harsh and unconscionable if in other respects it would not be so. "Harsh" and "unconscionable" alike refer to the conduct of the lender, and circumstances unknown to the lender cannot be relevant to his conduct in its moral aspect.

Necessities of the borrower.

But it is important to observe that the incapacity of the borrower to bargain and to protect his own interests may for the purposes of the Act be brought about by his situation in reference to his worldly affairs. "The necessities of the borrower" (*q*); his "financial distress" (*r*); his "urgent necessity, real or imaginary" (*s*); his "necessities such that he has no free will" (*t*)—these and other phrases of similar import denote a borrower whose embarrassments may afford him a title to relief which he otherwise might not have had. But in considering whether a borrower is entitled to relief on this ground, the writer ventures to submit that there are two considerations which are all-important, and which should never be lost sight of. One is: To what extent, if at all, is the money-lender himself responsible for the embarrassed circumstances in which the borrower finds himself? Is the borrower's position, for instance, due in any degree to large bonuses or high rates of interest obtained from him by the money-lender in previous transactions? or is he forced into a corner by execution issued against him by the money-lender in respect of a previous loan transaction?

Author's submissions.

The other consideration is: Was the borrower, in however desperate straits for money he may have been,

(*p*) JOYCE, J., in *Part* v. *Bond*, 21 T. L. R. 554.
(*q*) COZENS-HARDY, L.J., in *Poncione* v. *Higgins*, 21 T. L. R. 12.
(*r*) VAUGHAN WILLIAMS, L.J., *ib.*
(*s*) JOYCE, J., in *Part* v. *Bond*, 21 T. L. R. 554.
(*t*) CHANNELL, J., in *Carringtons, Ld.* v. *Smith*, App. F.

free to have recourse to whomsoever he would for assistance? or was he so circumstanced with regard to the money-lender that he was practically in his hands? (*u*).

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Ordinarily, the more distressed for money the borrower is, the greater is the risk which the money-lender incurs in making an unsecured loan, and the higher is the rate of interest which he is accordingly entitled to exact. It is submitted that unless there are some other special circumstances in the case, the necessities of the borrower ought not to afford any title to relief unless one or other of the above-mentioned considerations enters into the case.

The third distinction to be considered may be thrown into the form of a question, thus:—

(3) *Is there any Element of Fraud, Misrepresentation, or Undue Pressure present, or any Unconscionable Circumstance (other than the driving of a hard and usurious Bargain)?*

Presence or absence of some unconscionable circumstance: Fraud, &c.

It is unnecessary to specially consider here fraud or misrepresentation generally as affording a defence to an action of contract, or as entitling the deceived party to rescission. The ordinary principles of law apply to contracts of loan in the same way as they apply to other contracts. All that it is proposed to do in these notes is to notice a few special points in connection with money-lending.

The Default Clause as "a Money-lending Trap."—The clause which makes the whole amount of principal and interest outstanding become due upon default in payment of any agreed instalment is one which is "thoroughly understood by money-lenders," it having been "their mainstay for many years" (*x*). The importance of this clause for the purposes of the Act lies in the circumstance that it may not have been sufficiently understood by the

The default clause: "A money-lending trap."

(*u*) See *Bonnard* v. *Dott*, 21 T. L. R. 491.

(*x*) CHANNELL, J., in *Levene* v. *Greenwood*, 20 T. L. R. 389.

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Levene v. *Greenwood.*

borrower. *Levene* v. *Greenwood* (*y*) affords an illustration of a case in which a transaction was re-opened on the ground that the money-lender had not sufficiently brought to the attention of the borrower the nature and effect of the default clause.

An attempt was made to re-open the transaction in *Carringtons, Ld.* v. *Smith* (*z*) on this ground, but in that case the attempt failed. Inasmuch as CHANNELL, J., decided both these cases it appears to the writer that the best way of presenting the point to the reader is to place before him the two judgments, so far as they deal with this topic.

Judgment of CHANNELL, J., in *Levene* v. *Greenwood.*

In *Levene* v. *Greenwood* CHANNELL, J., is thus reported:—

> "Then came a fact which, he thought, although he had some doubt, altered the case. By the terms of the bargain the money was repayable in four monthly instalments, and in the event of any one instalment being unpaid the whole balance of the loan remaining unpaid became payable. The defendant, as he admitted, understood that the principal became due, but he did not understand that if he had failed to pay his first instalment the result would be that, instead of paying 50*l.* for the loan for 200*l.* for four months, he would pay 50*l.* for the loan for one month only. That transaction, which was difficult for anyone to understand, had the effect of about trebling the rate of interest. Money-lenders, of course, thoroughly understood the effect of that clause, which had been their mainstay for many years. In his opinion a case such as that, where one party thoroughly understood the effect of a bargain and did not explain the bargain to the other party ignorant of the effect (*a*), came within the section."

(*y*) 20 T. L. R. 389.

(*z*) App. F.

(*a*) It is submitted that these words should be understood "ignorant of the effect *to the knowledge of the money-lender.*" The money-lender must, it is submitted, either know that the borrower does not understand, or at least be responsible in some way for the borrower's ignorance.

The learned Judge accordingly relieved the defendant of all interest in excess of 2*s.* in the pound per month, which he had agreed to pay.

In *Carringtons, Ld.* v. *Smith* (*b*) the learned Judge said:—

"I next come to a decision of my own, *Levene* v. *Greenwood*, which has been followed in Ireland by the LORD CHIEF JUSTICE in a case of *Wells* v. *Joyce* ([1905] 2 Ir. Rep. 134). I there held that a default clause understood by the lender, but not understood by the borrower, made the transaction harsh and unconscionable. To that I quite adhere. There may be some difficulty about the word 'harsh,' but 'unconscionable' seems to me to quite hit that case. Amongst the very things that the Act does mean to hit, and I think does effectually hit, are the money-lending traps for the unwary. I should not hold 60 per cent. per annum to be of itself necessarily excessive or harsh or unconscionable, though of course circumstances might easily make it so, nor should I hold interest of 1*s.* in the pound per month (which is, of course, 60 per cent. per annum) to be necessarily so either; but if I found that the interest was put into the shape of 1*s.* in the pound per month in order to disguise it, and that in fact the borrower had not appreciated it, I should then hold that the interest was both excessive and harsh and unconscionable. In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident in his ability to pay and that he would not make default, and when this clause was under discussion what he said in substance was that he was more likely to want to pay before it was due than to get into arrear, and wanted to know what reduction would be made in that case. I would also point out that the Money-lenders Act does not, like the Bills of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for

(*b*) App. F.

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an indefinite time, of course the rate of interest is all-important, but where the loan is for a definite period, repayable by instalments or otherwise, I do not think that the borrower generally cares very much what the rate of interest on the amount from time to time outstanding as his instalments are paid works out at. What he does want to know is how much he is to pay for getting the accommodation which he asks, and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not. Assuming, however, that he is willing to pay the sum asked of him for the loan for a year, he probably will not be willing to pay that sum for the loan for a month only, and consequently a default clause not understood is, in my opinion, a trap."

The learned Judge in this case was satisfied that the defendant did understand the default clause, and accordingly refused relief (*c*).

Reprehensible conduct of money-lender.

Reprehensible Conduct of Money-lender.—By this the writer means any conduct which meets with the strong disapprobation of the Court on some ground other than the driving of a hard and usurious bargain. "All the circumstances" of the case are to be considered, and the Court may, and will, treat as harsh and unconscionable loan transactions at high rates of interest which have been brought about by discreditable practices, or by means which are not consistent with fair dealing between man and man. In the present state of the authorities the writer does not feel justified in attempting any more

(*c*) In an unreported case of *Samuel* v. *Elliott*, heard by the same learned Judge on the 2nd December, 1905, in which the writer was of counsel for the plaintiff, the default clause was again relied upon as a ground for relief, but the learned Judge found as a fact that the borrower sufficiently understood the nature and effect of the clause, although he had not made any calculation as to the precise effect of it upon the rate of interest payable for the loan in the event of it coming into operation, and relief was accordingly refused. This case is under appeal to the Court of Appeal.

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definite or accurate definition. The following propositions may, however, be laid down with confidence as not likely to be dissented from, and which, indeed, may be taken to be established by *In re A Debtor* (*d*), and other cases.

Author's submissions.

(1) That in every case where, had the Act not been passed, Courts of Equity would have set aside a transaction upon the ground of misrepresentation, undue influence, catching bargain, breach of duty on the part of a person occupying a fiduciary relation towards the person claiming relief, or any other ground, there such transaction is relievable against under the Act.

(2) That the Act goes further than the doctrines of equity and relieves in cases which cannot be brought within the principles on which Courts of Equity granted relief.

(3) That the Act does not define the "circumstances" which, in a case which would not have been relievable against in equity, yet may be regarded as rendering the transaction "harsh and unconscionable."

High rate of interest where no serious risk. *Saunders* v. *Newbold* discussed.

High Rate of Interest exacted where no appreciable Risk.—*Saunders* v. *Newbold* (*e*) falls to be classified under this head. The facts of that case were very extraordinary, and are not very likely to recur. Relief appears to have been given on the ground that the money-lenders were perfectly well aware of the fact that the borrower was a gentleman of wealth and position, and that having regard to the amount advanced, in relation to his means, they ran no risk whatever, and that it was therefore unconscionable in them to have exacted interest at the rate of 100*l.* per cent. per annum. Criticism of this case is disarmed by the finding of fact that the money-lenders knew perfectly well that they were running no appreciable risk. It is obvious that such a finding of fact in any ordinary

(*d*) [1903] 1 K. B. 705.

(*e*) [1905] 1 Ch. 260. It is understood that this case is under appeal to the House of Lords.

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case of unsecured loan would be impossible where the borrower is a person of sound mind, inasmuch as the mere fact of a man of sound mind being willing to pay such a rate of interest as 100*l.* per cent. is in itself the surest indication that, however well off he may appear to be, his real circumstances must be very different. The suggestion which KEKEWICH, J., made in this case, that the money-lenders might and ought to have made inquiries of the borrower's bankers has already been discussed (*f*).

Relying for security upon fear of exposure. Loans to youths. *King* v. *Osborne.*

Lending Money to a Youth in Reliance upon Fear of Exposure forcing his Parents to Pay. — In *King* v. *Osborne* (*g*) the borrower was a young officer in the army stationed in a garrison town. He had incurred considerable liabilities, including a liability to the plaintiff for money borrowed at a high rate of interest on security of his promissory note. With the assistance of his father, money was found to discharge his son's liabilities, including the plaintiff's promissory note, which was discharged by agreement by payment of a sum which represented the principal and interest at the rate of 100*l.* per cent. per annum. As part of the arrangement for extricating the officer from his embarrassments, money to the full value of his interest therein was raised upon his interest under his parents' marriage settlement, and the fact that he had no further available property beyond his pay, but that he was dependent upon his father for the allowance necessary to supplement his pay, were communicated to the plaintiff. The officer had promised his father that he would not again have recourse to money-lenders. Almost immediately after payment off of the plaintiff's note, the plaintiff tempted the officer to borrow again from him at the same high rate of interest as before, and JELF, J., found that

(*f*) *Ante*, p. 38.

(*g*) 20th May, 1905. It may be observed that independently of the Act the borrower in a case of this sort would probably have been entitled to relief in equity (*Nevill* v. *Snelling*, 15 Ch. D. 679).

the plaintiff had done this relying upon being able in due course, if the loan was not repaid by the officer, to squeeze a settlement from his father, who, he thought, would pay rather than suffer his son's conduct to be exposed. Relief was granted (*h*).

Tempting borrower. *Samuel* v. *Bell.*

Improperly tempting Borrower.—In *Samuel* v. *Bell* (*i*) the defendant, who carried on business in a city in the provinces, applied to the plaintiff by letter for a loan. The plaintiff wrote in answer that he would advance 200*l.*, the interest to be 100*l.* to be paid off at the rate of 25*l.* a month, ranging over twelve months. This offer the defendant declined by letter on the ground that the interest was too high. Defendant had borrowed money from money-lenders on other occasions. Upon receipt by the plaintiff of defendant's letter declining the proffered loan, the plaintiff sent by post to the defendant 200*l.* in Bank of England notes with a promissory note for 300*l.* payable by twelve equal monthly payments of 25*l.* each. The defendant being in urgent need of the money kept the notes and signed and returned the promissory note. The defendant paid five instalments and then made default and was promptly served with a writ. The defendant then appealed to the plaintiff to make some reduction in the amount if he paid the full amount, but this the plaintiff refused to do. Thereupon the defendant with great difficulty raised the money and paid the plaintiff the balance due with the costs of the writ. Within a week after this the plaintiff's agent called upon the defendant and made excuse for the harsh conduct of the plaintiff that the matter could not have been brought to the plaintiff's personal attention, and so forth, and tempted the defendant again to borrow 200*l.* upon the same terms as before. Defendant having made default and being sued

(*h*) See *The Times*, 22nd May, 1905.

(*i*) (1905) S. No. 3,834, unreported. The writer was of counsel for the plaintiff, and can vouch the accuracy of the note of the decision given in the text. The judgment was given after a *cur. adv. vult.*

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for the balance due upon the fresh note, the defendant claimed relief not only against the second transaction but against the first also. By consent, the Judge dealt with the action, which came before him in the short cause list, as if the defendant had filed a counterclaim claiming relief in respect of the first transaction which had been closed by payment. CHANNELL, J., re-opened both transactions and directed an account to be taken on a 20 per cent. basis. Relief against the two transactions was granted upon grounds different as to each.

As to the second transaction, it was re-opened partly on the ground that the advance of the second 200*l.* amounted substantially to restoring to the defendant the money of which he had been deprived by the pressure of the writ and partly on the ground that the plaintiff, knowing the difficulties in which the defendant had been placed by the pressure of the writ, had taken an unjust advantage of his necessities (which necessities it will be observed the plaintiff had himself contributed to bring about).

The first transaction was relieved against on the ground that there had not been an "independent, fair and open agreement" to pay the rate of interest bargained for. In face of the defendant's refusal of the loan on the terms offered, the money-lender had sent him the bank-notes, trusting, as the event proved, that the defendant's necessities would be so urgent as to overcome his objection to pay the high rate of interest demanded. The evidence of the defendant as to his necessities at the moment was that he required the money to pay his men's wages.

One point of great importance decided in this case was that payment made by a borrower in default, under pressure of a writ, does not disentitle him to relief in respect of such payment. This point is further dealt with in the notes to sect. 1, sub-sect. (2).

That the money-lender's conduct in *Samuel* v. *Bell* in the first transaction may have been "unconscionable"

may be conceded; but in what sense was it "harsh"? If "harsh" means anything different from "unconscionable," in what sense is it to be understood to support the decision in this case as to the first transaction? The words of the Act are "harsh *and* unconscionable" not "harsh *or* unconscionable." If one should say that everything "unconscionable" must be "harsh" and that everything "harsh" must be "unconscionable," then the two words are used to express the same meaning. The learned Judge in giving judgment said: "Tempting a man with money is 'unconscionable' if not 'harsh,'" so that the point did not escape his attention; but this case leaves us without any definition of the meaning of the word "harsh" as distinguished from "unconscionable," if, indeed, they do not mean one and the same thing, as this decision would seem rather to tend to indicate that they may do.

Borrower in power of lender.

Taking Advantage of the Borrower's dependent Situation and Incompetence to bargain at arm's length. Borrower in Power of Lender.—*Bonnard* v. *Dott* (*k*) serves to illustrate this.

Deductions for expenses.

Deductions for Expenses.—The practice of making a deduction for expenses from the amount advanced is believed to have obtained much more generally formerly than it does at present. It is believed that it has been discontinued by the greater number of money-lenders. The practice is objectionable for many reasons. Where a deduction in the name of "expenses" has been made, it will often be found that such deduction exceeds the actual out-of-pocket expenses incurred, and this may be treated by the Court as a misrepresentation, or at any rate as harsh and unconscionable conduct entitling the borrower to relief. Even if limited to actual out-of-pocket expenses it is objectionable in at least three respects:—(1) It savours of harshness, in that it throws upon the borrower an expense incurred in negotiating or completing

(*k*) 21 T. L. R. 491.

SECT. 1, SUB-SECT. (1).

a contract presumably at least as beneficial to the money-lender as to the borrower. (2) It renders more difficult to calculate the rate of interest and makes it less easy for the borrower to thoroughly appreciate the nature and effect of his contract. (3) Where a bargain has been made for the advance of a specific sum it may amount to a withholding of a part of that which the money-lender contracted to give to the borrower as the consideration for his contract.

(4) *Distinction between First Transactions and Renewals.*

This distinction does not seem as yet to have been brought by the decisions under the Act into such prominence as in the opinion of the writer it deserves to occupy.

In the case of unsecured loans, in the first transaction the lender risks his money; and it is this fact, and this fact alone, which justifies him in demanding a high rate of interest. The interest which is paid for the accommodation is not merely a payment made for the use of the money, as it is in the case of loans which are adequately secured—in a great measure it is a sum which is charged by the money-lender as a premium against risk of loss of the principal. But upon *a simple renewal* the money-lender risks nothing. His money is already fully risked, and a renewal merely amounts to giving the borrower so much further time in which to pay. The money-lender, certainly, runs the additional risk that the position of the borrower may go from bad to worse during the period of renewal, but against this he may derive benefit from the borrower being tided over a difficult time, and being in an improved position at the expiration of the renewal period. Probably, if the average of a sufficient number of instances could be taken, the one consideration would be found to practically balance the other. Laying out of account, therefore, any question of increased risk, all that a lender

is fairly entitled to demand upon a renewal is a fair interest for the use of his money during the renewal period.

In the case of *a compound renewal* (if the writer may be permitted to coin that phrase)—by which is meant a renewal in respect of the unpaid balance of a loan coupled with a fresh advance, the only money which the lender puts at risk is the amount of the fresh advance. The writer ventures to suggest that where transactions are reopened which have involved simple renewals at high rates of interest, as though they had been original loans, a principle which might with justice be adopted would be to allow interest on such renewals at a rate very much less than upon the original advances—say upon a basis of from 5 to 10 per cent. only.

In the case of a compound renewal so much of the former loan as was carried forward might thus be treated upon the suggested renewal basis, whilst so much as represented a fresh advance might be justly allowed to carry interest at the same rate as may be allowed in respect of the original advance.

Moreover, it is to be borne in mind that compound renewals frequently involve compounding the interest payable in respect of the first transaction, and it will not be denied that if it is just to interfere in any given case by cutting down the interest agreed upon, *à fortiori* it must be just to cut down interest charged upon interest.

OR IS OTHERWISE SUCH THAT A COURT OF EQUITY WOULD GIVE RELIEF.

It is not proposed to embark here upon an exhaustive or critical examination of the authorities in equity, or even to attempt an enumeration of them. The student is referred to the notes to *The Earl of Chesterfield* v.

SECT. 1, SUB-SECT. (1).

Relief in Equity.

Janssen (*l*), in White and Tudor's Leading Cases in Equity, vol. 1. All that it is proposed to do in this place is, by reference to a few cases, to present what is hoped will be found to be an accurate general view of the law as it stood previous to the Money-lenders Act upon the subject of relief in equity against unconscionable bargains.

It must always be borne in mind in considering any decision in equity previous to the repeal of the usury laws, that whilst those laws were in force transactions which fell within their scope and offended against them were avoided thereby quite independent of any circumstances of an unconscionable character which may have entered into or been attendant upon such transactions.

The repeal of the usury laws, however, did not affect the jurisdiction of the Court of Chancery to protect that somewhat vaguely defined class of persons known as "expectant heirs" (*m*), and, accordingly, if the facts were such that a Court of Equity would have interfered before the repeal of the usury laws, it would still have interfered between such repeal and the Money-lenders Act, except so far as the objections might have been founded upon usury alone.

COLLINS, M.R.

COLLINS, M.R., in *In re A Debtor* (*n*), said:—

> "Before the [Money-lenders] Act, the Courts of Equity used to give relief in special cases when the parties stood in a particular relation to each other, or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir."

(*l*) 2 Ves. 125.

(*m*) *O'Rorke* v. *Bolingbroke*, 2 A. C. 814; *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 11 Eq. 265; *Howley* v. *Cook*, Ir. Eq. 570; *Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Nevill* v. *Snelling*, 15 Ch. D. 679.

(*n*) [1903] 1 K. B. 705.

RIDLEY, J., in *Wilton* v. *Osborne* (*o*), said :—

Relief in Equity.

RIDLEY, J.

"It appears to be established by a series of decisions that a Court of Equity will not grant relief in such cases merely because the charges or interest are excessive. Every case has, indeed, to be judged by its own circumstances; but unless the borrower be of the class known as 'expectant heirs' (which requires distinct consideration) the rule is that, assuming him to be of full capacity, relief will not be granted unless it can be shown that he has been overreached, tricked, or deceived, and that the money-lender has taken an unfair and undue advantage of his weakness and necessities. The general rule is that neither excess of interest nor exorbitance of charge will suffice unless the element of unfair dealing is found to have existed."

JESSEL, M.R., in *Middleton* v. *Brown* (*p*) :—

JESSEL, M.R.

"What is the meaning of the term 'hard bargain'? If it has any distinct meaning at all, as distinguished from a mere term of abuse, it means in equity an unconscientious bargain—that is, a taking advantage of the position of one of the parties to the contract, and when I say 'taking advantage,' I mean, of course, taking an unfair advantage. When you have come to that point, and you have brought your proofs up to that, there is no doubt a case in which equity will relieve against such a bargain and set it aside altogether."

DENMAN, J., in *Nevill* v. *Snelling* (*q*), said :—

DENMAN, J.

"I can find no case which decides that the interference of the Court is limited to cases in which the dealings have been with expectant heirs or reversioners, or to

(*o*) [1901] 2 K. B. 110. The overruling of the decision in this case by the C. A. in *In re A Debtor*, [1903] 1 K. B. 705, in no way impairs the value of the passage quoted in the text. The judgment was a considered one.

(*p*) This was not a money-lending case, but the observations are applicable to money-lending cases.

(*q*) 15 Ch. D. at p. 703.

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cases in which the dealing has been one in relation to the expectancy; and I gather from the expressions used in several of the cases, that if the transactions are such as to show that the money-lender has throughout been unconscientiously trading upon the weaknesses of the borrower, commencing operations with him during his minority (*r*), charging him with usurious interest, and endeavouring to entangle him more and more in indebtedness, not as a fair matter of business, but looking to the chances of extorting money from others interested in the debtor (*s*), especially if there be any unfair dealing in the course of the transactions which are before the Court, the Court will so far restrain the transaction as to compel the money-lender to be satisfied with the sums advanced and fair interest for them. The real question in every case seems to me to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at full age, have been set aside because of the original vice with which they were tainted (*t*). In every case the Court has to look at all the circumstances. In some cases the conclusion may result that there exists mere inadequacy of price (*u*), or exorbitance of

(*r*) This was said with special reference to the facts of *Nevill* v. *Snelling*. Getting a young man into the toils before he comes of age is a strong—probably in most cases it would be in itself a decisive—circumstance in favour of granting relief.

(*s*) This, again, was said with special reference to the facts of the case. That this circumstance may be in itself sufficient to entitle the borrower to relief under the Act appears from *King* v. *Osborne*, referred to, *ante*, p. 60.

(*t*) The Infants' Relief Act, 1874, now renders such ratifications absolutely void.

(*u*) This refers to sales and not to borrowings.

Relief in Equity.

interest charged, in which case the transaction will not be interfered with. But in others, taking the whole history together, it may present so many features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction."

It may be doubted whether there was not sufficient in *Nevill* v. *Snelling* to have entitled the borrower to relief upon the principles above stated, even had he not come within the class of "expectant heirs." But the chief interest in the decision lies in the circumstance that DENMAN, J., held that the specially protected class of expectant heirs was not limited to actual dealings with reversions or expectancies, or even to *post obits*, or transactions entered into directly with reference to reversionary interests and expectancies, but embraced a young man, a younger son of a father possessing large property, who had no property of his own nor any expectation of any except such expectations as were founded upon his father's position in life, the money being lent upon the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son being made a bankrupt.

Aylesford v. *Morris*.

In *The Earl of Aylesford* v. *Morris* (*x*), a young nobleman, in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced money enough to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of securities his acceptances at three months for the sums advanced, with interest and discount, together exceeding the rate of 60 per cent. The acceptances became due, and the process was repeated, the young nobleman receiving a small advance. The borrower had no professional

(*x*) L. R. 8 Ch. 484.

SECT. 1, SUB-SECT. (1). Relief in Equity.

assistance in these matters, and no application was made to his father, or to the solicitors of the father. The father died before the second set of bills became due and the money-lender commenced actions upon them.

It was held by SELBORNE, L.C., and MELLISH, L.J., affirming WICKENS, V.-C., that the actions must be restrained (*y*), and a decree made for the delivery up of the bills on payment of the sum actually advanced with interest at 5 per cent.

An attentive perusal of the judgments of the EARL OF SELBORNE, L.C., in *Aylesford* v. *Morris* (*z*); of DENMAN, J., in *Nevill* v. *Snelling* (*a*); and, as to dealings with reversionary interests, of the Court of Appeal in *Brenchley* v. *Higgins* (*b*), will give the reader a good general view of this subject.

SELBORNE, L.C.

The following extracts from the judgment of SELBORNE, L.C., in *Aylesford* v. *Morris*, must suffice for this note:—

> "The usury laws proved to be an inconvenient fetter upon the liberty of commercial transactions; and the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable bargains. Both have been abolished by the Legislature; but the abolition of the usury laws still leaves the nature of the bargain capable of being a note of fraud in the estimation of the Court; and the Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases 'made *bonâ fide* and without fraud or unfair dealing,' and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. . . .
>
> "Lord CRANWORTH said, in a recent case in the House

(*y*) This case was before the Judicature Acts.

(*z*) L. R. 8 Ch. 484.

(*a*) 15 Ch. D. 679.

(*b*) 83 L. T. Rep. (N. S.) 751. This case shows the extent to which the old doctrines of equity as to the purchase of reversionary interests are still in force since the Sales of Reversions Act, 1867.

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of Lords (*c*), that no influence can be more direct, more intelligible, or more to be guarded against, than that of a person who gets hold of a young man of fortune, and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall be all ratified, so as to make the securities good (*d*). The circumstances of the particular case in which these words were spoken, differed widely from those of the case now before us, the element of personal influence is here wanting. *But it is sufficient for the application of the principle if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.*"

The LORD CHANCELLOR then goes on to explain the grounds upon which Courts of Equity threw, and still throw (though perhaps not to quite the same extent as formerly), protection round the "expectant heir."

Save that the doctrine that persons dealing with expectant heirs for reversionary interests, and so forth, have placed upon them the *onus* of showing that full value was given and no unfair advantage taken, has never (so far as the writer knows) been applied to ordinary unsecured money-lending transactions, the following remarks of Lord SELBORNE seem to be applicable to such transactions where the borrower has only recently come of age:—

SELBORNE, L.C., as to dealings with youths recently come of age.

"In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord

(*c*) *Smith* v. *Kay*, 7 H. L. C. 771.

(*d*) *Aylesford* v. *Morris*, in which this passage was quoted, was not a case where the money-lender had got hold of a youth during his minority.

SECT. 1, SUB-SECT. (1).

BROUGHAM to be an indispensable condition of equitable relief, though Lord ST. LEONARDS, with good reason, dissents from that opinion (*e*). The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may thereby be induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants."

ORDER 14.

Order 14.

Wells v. *Allott* discussed.

The ruling case upon Order 14 in relation to money-lending contracts is *Wells* v. *Allott* (*f*). In order to appreciate the precise effect of the judgments of the Court of Appeal it is necessary to have regard to the facts of that case. So far as material they were as follows:—The claim was by a money-lender upon a promissory note for 70*l*. This note was given in respect of the last of a series of loan transactions, the net result of which was that the plaintiff had advanced to the

(*e*) Sug. V. & P., 11th ed., p. 316.
(*f*) [1904] 2 K. B. 842.

defendant at various times sums amounting to 150*l.*, whilst the defendant had repaid at various times sums amounting to 140*l.* Assuming that the defendant was entitled to have all the series of transactions reopened, he would owe 10*l.* balance of principal, together with such interest as the Court might allow. Taken at 5 per cent. on the various advances from the dates when they were respectively made and crediting the repayments made, this interest amounted to 2*l.* 17*s.* 11*d.* The defendant admitted liability for 12*l.* 17*s.* 11*d.*, and the Master, under Order 14, made an order for payment to the plaintiff's solicitors, within four days, of this sum, the plaintiff to sign judgment for that amount; and he gave the defendant leave to defend as to the balance. From this order the plaintiff appealed, and PHILLIMORE, J., in chambers, considering upon the evidence that the defendant had no case for relief under the Act, gave the plaintiff leave to sign judgment for the full amount of his claim.

The defendant appealed to the Court of Appeal against the order of PHILLIMORE, J., and asked the Court of Appeal to restore the order of the Master. This the Court of Appeal did. The important point to notice is that there was no appeal against the Master's order, and accordingly the decision of the Court of Appeal assumed its propriety, and the judgments do not contain any expression of opinion upon that subject. All that the Court of Appeal did was to reverse the order made by the Judge. The case, therefore, is of no authority whatever upon the question whether the Master's order was a proper one, as MATHEW, L.J., pointed out in the course of the argument in the Court of Appeal of *Dott* v. *Bonnard* (*g*), presently to be referred to.

The point actually decided in *Wells* v. *Allott* may be taken to be that where in an action by a money-lender to recover money lent with interest it appears from the

(*g*) 21 T. L. R. 166.

SECT. 1, SUB-SECT. (1). Order 14.

evidence filed on behalf of the defendant (*h*) that there is a case for investigation under the Act, by reason of the high rate of interest charged, or on any other ground (*i*), the case cannot, as regards the claim for interest [or *quære* any higher rate of interest than 5*l.* per cent.], be dealt with upon an application for summary judgment under Order 14, but the action must go to trial for the purpose of having the claim to relief determined. Two points remain uncovered by this decision; one is, Is the Master or Judge in chambers entitled, in addition to the principal admittedly not repaid, to give the plaintiff leave to sign judgment for even 5*l.* per cent. interest?

The other is, Where there is a *primâ facie* case for relief, can the Master or Judge in chambers order the action to be put into the short cause list if the defendant objects?

On the first point it cannot be said that *Wells* v. *Allott* is of any direct authority. For the reason already pointed out, the Court of Appeal were not called upon to express any opinion as to the propriety of the Master's order so far as the 2*l.* 17*s.* 11*d.* for interest at 5 per cent. was concerned, and it is submitted that they must not be taken to have done so. The passages in the judgments which may be cited in support of the contention that not even 5 per cent. can be ordered are the following.

COLLINS, M.R., said:—

> "It seems impossible now to say that the procedure of Order 14 can be made applicable to an action by a money-lender *to recover interest* on money lent where the loan appears *primâ facie* to carry an excessive rate of interest."

COZENS-HARDY, L.J., said:—

> "This is not the class of case which can be dealt with under Order 14." . . . "I only decide that it is not a case for summary judgment under Order 14."

(*h*) Submitted.
(*i*) Submitted.

SECT. 1, SUB-SECT. (1).

Order 14.

"The Annual Practice" (1906, p. 121) lays it down that the proper order to make under Order 14 is to give the plaintiff judgment for any portion remaining due of the total money actually lent by the plaintiff to the defendant during the whole of the transactions forming the subject-matter of the action, *with 5 per cent. interest.*

The practice in chambers, in the writer's belief, is in accordance with the above statement in "The Annual Practice;" but it is submitted that the question must be considered doubtful until the Court of Appeal have pronounced upon it.

The other question is whether the Master or Judge in chambers can order an action to be put into the short cause list if the defendant objects? The writer has heard it contended more than once on behalf of defendants that this cannot be done. The argument used in support of such contention is founded upon the *dictum* of COZENS-HARDY, J., in *Wells* v. *Allott*, above quoted. It is said that the short cause list is, so to speak, part and parce of the Order 14 machinery, and that if money-lenders' cases are outside Order 14, they must also be outside Order 14, rule 8 (b), which relates to the short cause list. The writer is under the impression that this contention has never yet succeeded, and he submits rightly so; for an action by a money-lender, when the defendant sets up a *primâ facie* defence, would seem to differ in no material respect from any other action in which the writ is specially indorsed, and a *primâ facie* defence is disclosed entitling the defendant to leave to defend. Order 14, rule 8 (b), extends in terms to all cases in which leave to defend is given under that Order.

The only other case known to the writer in which the application of Order 14 to money-lending cases has been considered by the Court of Appeal is *Dott* v. *Bonnard* (*k*). In that case an action was brought by a

Dott v. *Bonnard.*

(*k*) 21 T. L. R. 166.

SECT. 1, SUB-SECT. (1). Order 14.

money-lender (*l*) to recover 1,040*l.*, the amount of two promissory notes. This sum represented 940*l.* principal lent and 100*l.* agreed "cash bonus" with which the defendant, in his affidavit filed in opposition to plaintiff's summons under Order 14, had no fault to find. But the defendant's case was that the plaintiff had from time to time obtained from him by way of bonuses 1,100 fully paid shares in one company, worth 550*l.*, and 3,700 shares in another company, worth 1,250*l.*, and an undertaking to deliver another block of shares worth over 3,200*l.*—altogether, in one form or another, upwards of 5,000*l.* Two days before plaintiff issued his writ in the King's Bench action the defendant had commenced an action against the plaintiff in the Chancery Division (*m*), claiming to have all the transactions reopened, and an account taken of what was fairly due to the plaintiff and an order for the return by the plaintiff of the shares and the delivery up of the undertaking to be cancelled. The Master, in the King's Bench action, made an order giving the defendant leave to defend on bringing 1,040*l.* into Court, and JELF, J., affirmed the Master's order. The defendant appealed to the Court of Appeal. That Court reversed the orders of JELF, J., and the Master and gave unconditional leave to defend. The learned editor of "The Annual Practice" (1906, p. 122) understands *Dott* v. *Bonnard* as being an authority for the proposition that "where there are special circumstances, as for example where the person sued by the money-lender is taking proceedings elsewhere for relief under the Act, there ought to be unconditional leave to defend." Without expressing any opinion upon the question whether a defendant by instituting proceedings in the Chancery Division for relief can evade the operation

(*l*) At this time the plaintiff, Dott, had not been found to be a money-lender, as he afterwards was in *Bonnard* v. *Dott*, but it was admitted for the purposes of argument in the Court of Appea that he was a money-lender, and the case proceeded upon that footing.

(*m*) This was the action *Bonnard* v. *Dott*, already more than once referred to.

of Order 14, the writer does not understand *Dott* v. *Bonnard* as an authority for that proposition. The writer understands the judgments in *Dott* v. *Bonnard* to proceed upon the ground that, in view of the fact that the defendant had handed over to the plaintiff shares by way of bonus which were sworn to be worth 1,800*l.* (being nearly double the value of the 940*l.* principal advanced), it remained to be seen whether, if the plaintiff were ordered to account (*n*) for these shares, it might not turn out that he had been repaid his principal "in meal if not in malt," and that under all the circumstances of the case it would not be right in any way to prejudge that question.

MODE OF TRIAL.

Mode of trial.

Sometimes in chambers upon summons for directions, or when directions are being given on leave being given to defend, one hears a defendant ask for a jury. But the writer submits that it is clear that the power to declare a transaction harsh and unconscionable, and to give relief under the Act, is a power which a Judge only can exercise, and that where there is no fraud or misrepresentation alleged and no contested fact put in issue upon the affidavits proper to be tried by a jury, trial by jury ought not to be ordered. It is within the knowledge of the writer that PHILLIMORE, J., and BRAY, J., in chambers, have accepted this view as correct.

WHEN IT IS NECESSARY TO COUNTERCLAIM.

So far as a defendant seeks relief under the Act by way of defence to the plaintiff's claim he need not deliver any counterclaim. But if he wants to re-open any

(*n*) As he afterwards was.

SECT. 1, SUB-SECT. (1).

previous transaction, by which is meant any transaction previous to the transaction sued upon, in order not only to defeat the plaintiff's claim but to recover back anything overpaid to the plaintiff, it is submitted that he *must* counterclaim. Moreover, if the transaction which is the subject of the action, *e.g.*, a promissory note sued upon, is so connected with or related to previous transactions that relief even by way of defence cannot be confidently hoped for unless such previous transactions are successfully impeached, he ought, it is submitted, to deliver a counterclaim impugning such previous transactions and claiming relief in respect of them also, although he may not seek any relief *ultrà* but may desire merely to raise a defence to the plaintiff's present claim.

Generally speaking, pleadings have no place in actions ordered to be put in the short cause list. In *Samuel* v. *Bell* (*o*), which came on as a short cause before CHANNELL, J., the defendant asked to reopen a transaction previous to the promissory note sued upon, which had, before action, been closed by payment. On objection being taken by counsel for the plaintiff that this could not be permitted, the defendant not having counterclaimed, CHANNELL, J., suggested that the difficulty might be overcome by adjourning the trial, or ordering the actions to be put into the ordinary non-jury list, and in either case giving the defendant leave to file a counterclaim. Upon this, counsel for the plaintiff consented to the action being dealt with as if a counterclaim had been filed claiming relief in respect of the first transaction (*p*). As to the necessity for a counterclaim in order to re-open past transactions, see *Saunders* v. *Newbold* (*q*).

(*o*) *Ante*, p. 61.

(*p*) Plaintiff's counsel requested that this concession might be borne in mind if and when the question of costs should come to be considered. Accordingly, on giving judgment against the plaintiff, CHANNELL, J., in consideration of such concession having been made, refrained from ordering the plaintiff to pay the costs of the successful defendant.

(*q*) [1905] 1 Ch. 260.

LENDERS NOT BEING PARTNERS, BUT JOINING AS CO-ADVENTURERS IN THE PARTICULAR TRANSACTION.

Where a loan is contributed to by several money-lenders, carrying on distinct businesses, but associated as co-adventurers in the particular transaction, the knowledge of any one of them as to any fact material to the question of relief will be imputed to them all (*r*).

AS TO RE-OPENING PAST TRANSACTIONS.

See notes to sub-sect. (2).

COUNTY COURT RULES.

See Appendix E.

Sect. 1, *sub-sect.* (2).—Any Court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may at the instance of the borrower or surety or other persons liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

Sub-sect. (1), it will have been observed, applies only in cases where proceedings are being taken by a money-

(*r*) *Saunders* v. *Newbold*, [1905] 1 Ch. at p. 275.

SECT. 1, SUB-SECT. (2).

lender. This sub-section empowers "the borrower, or surety, or other person liable," to institute proceedings against the money-lender for relief.

Saunders v. *Newbold.*

It was argued, unsuccessfully, in *Saunders* v. *Newbold* (*s*), that the words "or other person liable" confined the right to relief to cases in which there remained some pending liability under the transaction sought to be set aside; and that this sub-section ceased to apply when the person claiming relief ceased to be a borrower, and ceased to be under any liability. But the Court of Appeal negatived this contention. *Saunders* v. *Newbold* shows that the Court has power, when re-opening an existing transaction, to re-open also one that is past and closed.

The Court of Appeal in this case said that sub-sect. (2) applies to a case where the loan has been repaid, and that it is not limited to cases in which the money-lender has an unsatisfied cause of action. Given a Court of competent jurisdiction, that Court can exercise under sub-sect. (2), at the instance of the borrower, all the powers which are given to the Court by sub-sect. (1) in cases where the proceedings are instituted by the money-lender. One of these powers is to order repayment by the money-lender, and this shows that the word "liable" in sub-sect. (2) cannot be limited in its meaning to "liable in fact." The Court of Appeal further pointed out that the Act is an amending Act, amplifying the powers formerly exercised by the Court of Chancery, and that the Court of Chancery did not allow the fact of repayment to prevent the re-opening of a transaction entered into by a borrower whom the Court deemed from the circumstances of the case unable to protect himself.

The Court also held that relief may be obtained by the borrower, not only when he is sued, but before he is sued.

(*s*) [1905] 1 Ch. 260. The writer understands that this case is under appeal to the House of Lords.

SECT. 1, SUB-SECT. (2).

But although *Saunders* v. *Newbold* has established the two following propositions, viz., (1) That where relief is sought in proceedings instituted by a money-lender, the Court has power, under sect. 1, sub-sect. (1) to re-open a closed transaction provided it is relevant to or in some way connected with the existing transactions; and (2) that the Court has power under sect. 1, sub-sect. (2) to re-open any past transaction, that case throws no light upon the question what lapse of time, if any, or what circumstances will debar a borrower from suing to re-open a closed transaction not relevant to or in any way connected with any existing transaction. The writer opines that the relief grantable under the Act, being in a great measure discretionary, and being closely analogous to, though not identical with, the relief formerly obtainable in equity, will be administered upon principles as to *laches* as nearly as possible the same as those which obtained in Courts of Equity before the Act. Probably it will be held that no Statute of Limitations applies; but it is submitted that a borrower who intends to claim relief against a closed transaction will be expected to institute proceedings for relief with due diligence, and will be required, in case of avoidable delay, to give some satisfactory excuse for such delay. In other words, that the Courts will treat the right to relief under the Act as equitable, as distinguished from legal relief, and will grant or withhold relief upon those principles relative to *laches* and delay, which are well established in all cases where purely equitable relief is sought and which find expression in the familiar maxim *Vigilantibus non dormientibus æquitas subvenit.*

Can relief be given by the Ch. Div. against a King's Bench judgment?

Relief against a Judgment.—The principle that money paid under pressure of legal process could not, in the absence of fraud, be recovered back at law (*t*) has no relation to relief under the Money-lenders Act any more than it had to relief in equity before the Act. CHANNELL, J., in

(*t*) *Marriott* v. *Hampton*, 7 T. R. 269, and notes thereto, in "Smith's Leading Cases."

SECT. 1, SUB-SECT. (2).

Can relief be given against a judgment?

the unreported case of *Samuel* v. *Bell*, already referred to (*u*), so held. In that case that learned Judge said:—

> "The question arises in this case whether a transaction can be re-opened after payment has been made under the pressure of a writ? Before the Judicature Acts the Court of Chancery used to grant injunctions restraining actions at law, and even proceedings upon judgments which had been recovered at law. Therefore proceedings at law constituted no objection to the exercise of the jurisdiction to give relief in equity. In one case (*x*), which is referred to in the notes to *Chesterfield* v. *Janssen* in White and Tudor's 'Leading Cases in Equity,' relief was given and repayment ordered where the money had been paid in order to avoid a threatened execution. The issue of a writ, therefore, is not a bar to the exercise of the jurisdiction. Indeed, in certain cases the issue of a writ may constitute the very pressure which the jurisdiction is designed to meet."

Accordingly, in *Samuel* v. *Bell*, relief was granted as to a transaction which had been closed by payment made under the pressure of a writ.

The reference, however, to the jurisdiction of the Court of Chancery to give relief even against a judgment obtained at law raises a question of great importance, which is: Whether, since the Judicature Acts, the Chancery Division can relieve against a judgment obtained in the King's Bench Division? The question will probably present itself for decision at no very distant date.

In the meantime, the writer ventures to submit that this question should be answered in the negative.

Before the Judicature Acts all Courts of Law disregarded

(*u*) *Ante*, p. 61. The passage from the judgment quoted in the text is from the writer's note of the judgment taken upon his brief. Not being taken in shorthand, the precise language is not reproduced, but it may be relied upon as substantially accurate.

(*x*) The learned Judge probably referred to *Curwyn* v. *Milner*, 3 P. Wms. 292 *n*. See also, on this point, the cases referred to in *Harrison* v. *Nettleship*, 2 My. & K. 423.

SECT. 1, SUB-SECT. (2).

Can relief be given against a judgment?

merely equitable rights, and if the Court of Chancery had treated the judgment of a Court of Common Law as a bar to relief, no relief could have been obtained. For it would have been useless to apply to the Common Law Court to set aside one of its own judgments, regularly obtained, merely on the ground that equitable circumstances existed of which the Court was incompetent to take judicial notice (*y*). The only relief obtainable was in equity, and the circumstance that relief could not be obtained in the Court in which the legal proceedings were proceeding was the reason for the exercise by the Court of Chancery of its special jurisdiction to give relief. Accordingly it was laid down before the Judicature Acts that a Court of Equity had no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground equally available at law and in equity (*z*).

Sir JOHN LEACH, M.R., said:—

> "A Court of Equity has no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity proceeds upon a ground equally available at law and in equity [unless the plaintiff can establish some special equitable ground for relief]."

The MASTER OF THE ROLLS then referred to three cases in which equity had relieved against judgments. The writer submits that in each of the three cases referred to the special equity in question could not have been used at law to get rid of the common law judgment, and that the words above enclosed within brackets in the above quoted passage, in order to be applied to the present state of

(*y*) The writer has not overlooked the Common Law Procedure Act 1854, s. 83, by which equitable defences became pleadable at law, but this only enabled defences to be pleaded which amounted to an unqualified and absolute answer to the action (*Jeffs* v. *Day*, L. R. 1 Q. B. 372). Where the defendant required some modified relief he had still to resort to equity. Moreover, in the view of the writer, sect. 83 of the Common Law Procedure Act, 1854, has no relation to giving relief against judgments.

(*z*) *Harrison* v. *Nettleship*, 2 My. & K. 423.

SECT. 1, SUB-SECT. (2).

Can relief be given against a judgment?

affairs should be read "unless the plaintiff can establish some special equitable ground for relief which he could not have relied upon in the Court in which the judgment was obtained, either as an answer to the action or as a ground for setting aside the judgment."

If this submission is well founded, the case excepted by Sir JOHN LEACH can no longer constitute any exception, for upon application duly made to the King's Bench Division for a new trial or to set aside the judgment, every ground upon which such judgment is impeachable at law or in equity is available to the party.

It was never at any time a ground for equitable interference that a party had not effectually availed himself of a defence at law (*a*).

The writer accordingly submits that a defendant who has allowed judgment to be recovered against him in the King's Bench Division in a case in which he might have relied upon the Money-lenders Act by way of defence, but omitted to do so, cannot go to the Chancery Division for relief, but must apply to the King's Bench Division for a new trial or to set aside the judgment, when the matter will be dealt with by the King's Bench Division in accordance with the principles applicable to the granting of new trials or to the setting aside of judgments, as the case may be (*b*). It is submitted that this question is not affected by sub-sect. (6) of this section.

Magaziner v. *Samuel*.

In *Magaziner* v. *Samuel* (*c*) this subject would seem to have been discussed, but as the judgment in the King's Bench Division had been set aside and the only question was as to whether the Chancery proceedings should be stayed until after the trial of the King's Bench action, the point would seem not to have really arisen for decision.

(*a*) *Simpson* v. *Howden*, 3 My. & Cr. 108; *Ware* v. *Horwood*, 14 Ves. 31; *Bateman* v. *Willes*, 1 Sch. & Lef. 204.

(*b*) See Judicature Act, 1873, s. 24 (5); *Wright* v. *Redgrave*, 11 Ch. D. 24; *In re Artistic Colour, &c., Co.*, 14 Ch. D. at p. 505.

(*c*) 12th December, 1905. Unreported, but noted vol. 120, Law Times Journal, 152.

County Court Rules.—See Appendix E.

Sect. 1, *sub-sect.* (3).—On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

In re A Debtor.

In *In re A Debtor* (*d*) the Court of Appeal held that the power to give relief can be exercised by the Court of Bankruptcy upon the hearing of a petition by a money-lender for a receiving order against a borrower, the petition being founded on a final judgment recovered in an action in which the debtor did not apply for relief under sect. 1.

This is not by reason of the language of the sub-section, which, it will be observed, only applies in terms to applications relating to the admission or amount of a proof by a money-lender, but is by reason of the well-established rule in bankruptcy under which the Bankruptcy Court is entitled to "go behind" a judgment and inquire into the consideration upon which it is founded. But for this rule a debtor, by submitting to judgment, might deprive his just creditors of their rights (*e*). The jurisdiction of the Registrar in Bankruptcy is not to set aside or review the judgment, but merely to decide whether he will or will not make a receiving order upon it (*f*). Accordingly his decision does not operate as *res judicata*.

By sect. 23 of the Bankruptcy Act, 1890 :—

> "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the

(*d*) [1903] 1 K. B. 705.
(*e*) See *Ex parte Kibble, In re Onslow*, L. R. 10 Ch. 373.
(*f*) *In re Vitoria*, [1894] 2 Q. B. 387.

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purposes of dividend, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The above sub-section, which would accordingly appear not to have been required in order to cut down a money-lender's proof for the purposes of dividend, would seem to render money-lenders' proofs liable to be cut down for all purposes. It does not follow, however, that if cut down under this sub-section, they should be cut down to a 5 per cent. basis.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

(5) Nothing in the foregoing provisions of this section shall affect the rights of any bonâ fide assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

(7) In the application of this Act to Scotland this section shall be read as if the words "or is otherwise such that a court of equity would give relief" were omitted therefrom.

The reason for sub-sect. (7) is that no distinction between law and equity obtains in Scotland (*g*).

Registration of money-lenders, &c.

2.—(1) A money-lender as defined by this Act—

(a) shall register himself as a money-lender in accordance with regulations under this

(*g*) *Wilton* v. *Osborne*, [1901] 2 K. B. 110.

Registration of money-lenders.

Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

(b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

(d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

(2) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and in the case of a second or subsequent conviction to

SECTS. 2, 3.

imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both: Provided that if the offender be a body corporate that body corporate shall be liable on a second or subsequent conviction to a fine not exceeding five hundred pounds.

(3) A prosecution under sub-section (1) (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

Victorian Daylesford Syndicate v. *Dott.*

In *The Victorian Daylesford Syndicate* v. *Dott* (*h*) BUCKLEY, J., held that sect. 2, sub-sect. (c) applies to the case of a money-lender who has not registered his name under the Act; and that the result is that he cannot make any valid agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender. As this decision is fully reported, and is, moreover, under appeal to the Court of Appeal, it is considered undesirable to discuss in this place the judgment, or the reasoning on which it is based (*i*).

Regulations as to registration.

3.—(1) The Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, whether individuals, firms, societies, or companies, the form of the register, and the

(*h*) [1905] 2 Ch. 624.

(*i*) Apart from these considerations, the circumstance that the writer was of counsel for the defendant would render it improper for him to offer any criticism upon the decision pending the appeal.

particulars to be entered therein, and the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor.

(2) The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal.

For order as to fees, see Appendix.

Penalties for false statements and representations.

4. If any money-lender, or any manager, agent, or clerk of a money-lender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a money-lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and shall be liable on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both.

Amendment of 55 & 56 Vict. c. 4, s. 2, as to presumption of knowledge of infancy.

5. Where in any proceedings under section two of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he

SECTS. 5, 6.

proves that he had reasonable ground for believing the infant to be of full age.

For the material sections of the Betting and Loans (Infants) Act, 1892, see Appendix, where also will be found the Infants' Relief Act, 1874.

Sect. 5 operates to extend the provisions of sect. 3 of the Betting and Loans (Infants) Act, 1892, which was confined to circulars, &c., sent to infants "at any university, college, school, or other place of education."

Definition of money-lender.

6. The expression "money-lender" in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include—

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers; or

(b) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or

59 & 60 Vict. c. 25.

6 & 7 Will. IV. c. 32.
3 & 4 Vict. c. 110.

(c) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(d) any person bonâ fide carrying on the business of banking or insurance or bonâ fide

carrying on any business not having for its primary object the lending of money, in the course of which and for the purpose whereof he lends money; or

(e) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

Sub-sect. (d). This sub-section was considered by KEKEWICH, J., in *Bonnard* v. *Dott* (*k*).

Sub-sect. (e). For Regulations dated 25th October, 1900, made by the Board of Trade as to the exemption of bodies corporate, see Appendix C.

Short title and commencement.

7.—(1) This Act may be cited as the Money-lenders Act, 1900.

(2) This Act shall come into operation on the first day of November one thousand nine hundred.

By sect. 1 (1) the Act is limited in its application to cases

(a) where money is lent after the commencement of the Act; or

(b) where agreements made after the commencement of the Act, or securities taken after the commencement of the Act, are sought to be enforced.

(*k*) 21 T. L. R. 491.

APPENDICES.

APPENDIX A.

MONEY-LENDERS ACT, 1900.

(63 & 64 VICT. c. 51.)

An Act to amend the Law with respect to Persons carrying on business as money-lenders. [8th August, 1900.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Re-opening of transactions of money-lender.

1.—(1) Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for

expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) On any application relating to the admission or amount of proof by a money-lender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender

(5) Nothing in the foregoing provisions of this section shall affect the rights of any bonâ fide assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

(7) In the application of this Act of Scotland this section shall be read as if the words "or is otherwise such that a court of equity would give relief" were omitted therefrom.

Registration of money-lenders, &c

2.—(1) A money-lender as defined by this Act—

(a) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

(b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

(d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

(2) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a

fine not exceeding one hundred pounds, or to both: Provided that if the offender be a body corporate that body corporate shall be liable on a second or subsequent conviction to a fine not exceeding five hundred pounds.

(3) A prosecution under sub-section (1) (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

Regulations as to registration.

3.—(1) The Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the registration of money-lenders, whether individuals, firms, societies, or companies, the form of the register, and the particulars to be entered therein, and the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor.

(2) The registration shall cease to have effect at the expiration of three years from the date of the registration, but may be renewed from time to time, and if renewed shall have effect for three years from the date of the renewal.

Penalties for false statements and representations.

4. If any money-lender, or any manager, agent, or clerk of a money-lender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a money-lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanour, and shall be liable on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both.

Amendment of 55 & 56 Vict. c. 4, s. 2, as to presumption of knowledge of infancy.

5. Where in any proceedings under section two of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age.

6. The expression "money-lender" in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include— Definition of money-lender.

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers; or

(b) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or 59 & 60 Vict. c. 25. 6 & 7 Will. IV. c. 32. 3 & 4 Vict. c. 110.

(c) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(d) any person bonâ fide carrying on the business of banking or insurance or bonâ fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(e) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

7.—(1) This Act may be cited as the Money-lenders Act 1900. Short title and commencement.

(2) This Act shall come into operation on the first day of November one thousand nine hundred.

APPENDIX B.

THE INFANTS' RELIEF ACT, 1874.

(37 & 38 Vict. c. 62.)

1. All contracts whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as "The Infants' Relief Act, 1874."

See Appendix I.

BETTING AND LOANS (INFANTS) ACT, 1892.

(55 Vict. c. 4.)

An Act to render Penal the inciting Infants to Betting or Wagering or to borrowing Money. [29th March, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual

and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows

Persons sending documents to an infant inciting to betting guilty of a misdemeanour.

1.—(1) If anyone, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to anyone as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of the sending of such document.

Persons sending to infants circulars inviting to borrow money guilty of a misdemeanour.

2.—(1) If anyone, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to

any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanour and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

Knowledge of infancy presumed in certain cases.

3. If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

Soliciting infant to make affidavit in connexion with loan.

4. If anyone, except under the authority of any Court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not

exceeding three months, or to a fine not exceeding one hundred pounds.

Avoiding contract for payment of loan advanced during infancy.

5. If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.

Person charged a competent witness.

6. In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

Application to Scotland.

7. In the application of this Act to Scotland :

The word "infant" means and includes any minor or pupil :

The word "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887 :

50 & 51 Vict. c. 35.

The expression "summary conviction" means a conviction under the Summary Jurisdiction (Scotland) Acts.

Short title.

8. This Act may be cited as the Betting and Loans (Infants) Act, 1892.

APPENDIX C.

STATUTORY RULES AND ORDERS, 1900.—No. 804.

MONEY-LENDER.

REGULATIONS, DATED OCTOBER 25, 1900, MADE BY THE BOARD OF TRADE AS TO THE EXEMPTION OF BODIES CORPORATE FROM REGISTRATION UNDER THE MONEY-LENDERS ACT, 1900.

WHEREAS by section 6 of the above-mentioned Act it is provided that "the expression 'Money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself, or holds himself out in any way as carrying on that business; but shall not include, *inter alia*—

"(e) Any Body Corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade."

Now, therefore, the Board of Trade, in pursuance of the powers vested in them by the above-recited section, do hereby make the following regulations accordingly:—

Regulations.

1. The application for exemption under the above section shall be made on foolscap paper in the Form A hereto annexed, and shall be signed by some responsible officer by and on behalf of the Body Corporate seeking for such exemption.

2. Such application shall be accompanied by—

(a) In the case of a Body Corporate registered under the Companies Acts, a copy of the Memorandum and

Articles of Association, and, in other cases, a copy of the Charter, Deed of Settlement, or other document of Incorporation, and the Regulations governing the rights of members, such copies being certified by some responsible Officer of the Body Corporate as true copies.

(b) A Statutory Declaration by a responsible Officer of the Body Corporate setting out the nature of the business carried on by the Body Corporate.

(c) A copy of the last balance sheet.

3. The Board of Trade may require, and the Body Corporate (if so required) shall supply such further information by Statutory Declarations, production of documents, or otherwise, as the Board may think proper, concerning the constitution, objects, and financial position of the Body Corporate, and also concerning the manner in which the said Body Corporate has carried on the business.

4. The Board of Trade may, if they think fit, require notice of the application to be advertised in such papers as they may prescribe.

5. If, in the opinion of the Board of Trade, the Body Corporate is a proper one for exemption under the Act, the Board will make an Order exempting such Body Corporate from registration under the Act upon such conditions and for such period as the Board may think fit. Such Order shall be in the annexed Form B, or in such other form as the Board shall from time to time direct.

6. In the case of a Body Corporate registered under the Companies Acts, the Order shall be signed in quadruplicate by the Permanent Secretary to the Board of Trade, or by one of the Assistant Secretaries to the Board, or by such person as may be authorised in that behalf by the President of the Board of Trade. In all other cases such Order shall be signed in triplicate in manner aforesaid. One copy will be retained by the Board, and another copy will be forwarded to the Body Corporate.

7. The Board of Trade will also forward another of such copies to the office provided by the Commissioners of Inland Revenue, as specified in Section 2 of the Act, and in the case

of a Body Corporate registered under the Companies Acts, will forward the remaining copy to the Registrar of Joint Stock Companies.

8. The Body Corporate shall forthwith publish a copy of the said Order in the *London* or *Edinburgh* or *Dublin Gazette*, as the case may require, and in such other papers as the Board of Trade may direct.

9. Upon the expiration of the period limited by any Order, the Body Corporate may make a further application for renewal of the Order of exemption, and the Board of Trade may from time to time make further Orders exempting the Body Corporate from registration upon such conditions, and for such further period as the Board may think fit.

10. The Board of Trade may at any time by an Order signed in manner provided by Regulation numbered 6 hereof revoke any Order of exemption and shall cause notice of such revocation to be given to the Body Corporate, to the Commissioners of Inland Revenue, and in the case of Bodies Corporate registered under the Companies Acts, to the Registrar of Joint Stock Companies, and upon such revocation, the Body Corporate shall cease to be exempted from registration under the Money-lenders Act, 1900. The Board of Trade shall also cause a copy of the revoking Order to be published in the *London* or *Edinburgh* or *Dublin Gazette*, as the case may require.

COURTENAY BOYLE.

Board of Trade,
25th October, 1900.

A.

THE MONEY-LENDERS ACT, 1900.

Application for the Exemption of a Body Corporate from Registration under the above-mentioned Act.

I[1], of in the County of , being duly authorised in that behalf by[2] hereby make application to the Board of Trade on behalf of the said[3] , being a Body Corporate, incorporated by[4] for an order exempting the said Body Corporate from registration as a Moneylender

under the provisions of the above-mentioned Acts, on the following grounds[5]:—

Dated this day of , 19 .

(Signed)

(*Here add official designation.*)

To the Secretary,
Board of Trade,
7, Whitehall Gardens,
London, S.W.

[1] Here insert name and address and official designation of applicant.
[2] Here insert name and address of Body Corporate.
[3] Here insert name of Body Corporate.
[4] Here state whether incorporated by Charter, Deed of Settlement or other document of incorporation, or under the Companies Acts.
[5] Here state grounds for exemption.

B.

THE MONEY-LENDERS ACT, 1900.

Order of Exemption.

In pursuance of the powers conferred upon the Board of Trade by section 6 (e) of the Money-lenders Act, 1900, the Board of Trade do hereby order that the[1] , whose address is[1] be exempted from registration as a Money-lender under the provisions of the above-mentioned Act for a period of three years from the date of the publication of this Order in the *Gazette*, or until earlier revocation of this Order by the Board of Trade.

Dated this day of , 19 .

Signed on behalf of the Board of Trade.

[1] Here insert full name and address of Body Corporate.

APPENDIX D.

STATUTORY RULES AND ORDERS, 1900.—No. 738.

PUBLIC OFFICE. COLLECTION OF FEES BY STAMPS.

ORDER OF THE COMMISSIONERS OF INLAND REVENUE DATED SEPTEMBER 11, 1900, AS TO THE AMOUNT OF FEES TO BE PAID UNDER THE MONEY-LENDERS ACT, 1900, AND TREASURY ORDER DATED OCTOBER 3, 1900, AS TO THE COLLECTION OF THE SAME BY MEANS OF STAMPS.

WHEREAS by Section 3 (1) of the Money-lenders Act, 1900 (63 & 64 Vict. cap. 51), it is provided, among other matters, that the Commissioners of Inland Revenue, subject to the approval of the Treasury, may make regulations respecting the fees to be paid on registration and renewal of registration, not exceeding one pound for each registration or renewal, and respecting the inspection of the register and the fees payable therefor :—

Now we, the undersigned, being two of the said Commissioners, with the approval of the Treasury, do hereby order and direct,—

1. That the fee to be paid in respect of each registration or renewal thereof, whether such renewal shall arise in consequence of the expiration of the statutory period of three years after which registration shall cease to have effect, or in consequence of any change which may be made during that period in respect of name or names, address or addresses, of the person or persons registered or in any other particular, shall be the sum of One pound.
2. That the fee payable for the inspection of each separate return on the register shall be the sum of One shilling. On the payment of this fee of One shilling, together with the Stamp duty of One shilling chargeable

by law on a certified copy or extract from any public register, any person shall, on demand, be furnished with a Certified copy of any registered Return.

F. L. ROBINSON,
EDMUND H. WODEHOUSE,
Two of the Commissioners of Inland Revenue.

Dated the eleventh day of September, 1900.

And whereas by Section 3 of the Public Offices Fees Act, 1879, it is provided that the Treasury may, from time to time, make, and when made, revoke, alter, or add to, regulations for all or any of the following purposes respecting fees in any public office; that is to say:—

1. Regulating the manner in which the fees taken in money are to be taken, accounted for, and paid over.
2. Determining the use of impressed or adhesive stamps and the mode of cancellation of adhesive stamps.
3. Regulating the use of stamps and prescribing the application thereof to documents from time to time in use, and requiring documents to be used for the purpose of such stamps.

Now we, the undersigned, being two of the Lords Commissioners of Her Majesty's Treasury, do hereby give notice and order and direct that the fees under the Money-lenders Act, 1900, mentioned in the foregoing Order shall be collected by means of stamps, and that all such stamps shall be impressed stamps.

The said impressed stamps shall be of such design and character as the Commissioners of Inland Revenue may from time to time adopt for the purpose.

We do further give notice that this Order shall be binding on all officers or persons whom it may in any way affect.

H. T. ANSTRUTHER,
W. H. FISHER,
Two of the Lords Commissioners of Her Majesty's Treasury.

Dated this 3rd day of October, 1900.

APPENDIX E.

COUNTY COURT RULES (FEBRUARY), 1901.

DATED 25 FEBRUARY, 1901.

ORDER 51, rule 246 (rule 44 of November, 1900), is hereby annulled, and the following rule shall stand in lieu thereof:—

1. Where proceedings are taken by a money-lender the powers of the Court under sub-sect. 1 of sect. 1 of the Money-lenders Act, 1900, may be exercised at any stage of the proceedings, and whether notice has or has not been given by the defendant of his intention to apply to the Court to exercise such powers; subject, nevertheless, where no notice or insufficient notice of such intention has been given, to such terms as to adjournment, furnishing of particulars, costs, and otherwise as may be just.

2. An application to the Court under sub-sect. 2 of sect. 1 of the said Act, at the instance of the borrower or surety or other persons liable, shall be by action commenced by plaint and summons in the ordinary way.

Particulars of demand shall be filed in such action stating concisely the grounds on which the application is made and the relief which the plaintiff claims.

ALFRED MARTINEAU.
HENRY R. STONOR.
W. L. SELFE.

Approved—

HALSBURY, C.
A. L. SMITH, M.R.
F. H. JEUNE, P.
ROLAND L. VAUGHAN WILLIAMS.
GAINSFORD BRUCE, J.
HERBERT H. COZENS-HARDY, J.
WALTER C. RENSHAW.

I allow this rule, which shall come into force on the 1st day of April, 1901.

(*Signed*) HALSBURY, C.

February 25, 1901.

APPENDIX F.

[*Reprinted by permission of The Times from that paper under date December 4th*, 1905.]

High Court of Justice,
King's Bench Division.

Before MR. JUSTICE CHANNELL.

CARRINGTONS (LIMITED) *v.* SMITH.

THIS was an action brought by Carringtons (Limited) against Mr. Johnson Smith, of * * * (*a*), the plaintiffs claim being against the defendant as maker of a promissory note for 150*l.*, dated December 31, 1904, payable to the plaintiffs by monthly instalments of 12*l.* 10*s.* each on February 1, 1905, and on default of payment of any one instalment when due the whole amount then remaining unpaid to forthwith become due and payable, default having been made in payment of an instalment. The plaintiffs had been repaid seven instalments of 12*l.* 10*s.*, amounting to 87*l.* 10*s.*, and now claimed a balance of 62*l.* 10*s.*, with interest thereon at 5 per cent. per annum from September 5, 1905, 4*s.* 6*d.* The defendant claimed relief under sect. 1, sub-sect. 1 of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51). The facts and authorities cited are fully dealt with in the judgment.

Mr. T. B. NAPIER, for the defendant, submitted—(1) That the interest was excessive; (2) that the defendant was under immediate pecuniary necessity; and (3) that the plaintiffs had ample security. If a man had plenty of security to give and was, so to speak, well off, anything above 15 or 20 per cent. was excessive. As to the default clause in the promissory note, it was harsh and unconscionable. It had not

(*a*) As no useful purpose would be served by giving the address of the defendant it is omitted throughout this reprint.

been shown that the borrower's attention was called to it, and if he did not appreciate it it was harsh and unconscionable. If the borrower was in need and there was practically no risk, the interest was excessive.

Mr. R. W. ATKINS, for the plaintiffs, submitted that, as defendant gave a receipt in his own handwriting, he must be taken to have understood it.

The arguments took place on November 18 last, when judgment was reserved.

Mr. Justice CHANNELL to-day read the following judgment:—This action was brought to recover a balance of 62*l.* 10*s.* due on a promissory note. The note was admitted, and the defendant claimed relief under the Money-lenders Act. The facts are as follows:—The defendant T. Johnson Smith is a director of a publishing company. He has as such director an income which he estimates at 1,000*l.* per annum, derived, however, partly, at any rate, from commissions. He lives at * * * and he estimates that the furniture in his house there, which, with the exception of a grand piano, is his own, is worth 3,000*l.*, and he has pictures which he estimates to be worth 6,000*l.* He was called as a witness, and he appeared to be a quite reliable one. I accept his statements, except his opinion as to the exact value of his pictures and furniture, which he probably over-estimates, as most owners of such property do. In December, 1904, he owed about 150*l.*, his creditors were said to be pressing for payment, but had not taken any steps to enforce it, and no execution was imminent or anything of that kind. Having no ready money to pay, and having seen an advertisement or received a circular from the plaintiffs, who are registered as money-lenders, he called at their office. The circular or advertisement which took him to the plaintiffs was not put in, and no complaint was made of its terms. He saw a manager and told him that he wanted a loan of 150*l.*, and stated the facts as to his position, which I have mentioned above. The manager arranged to call at his house at * * * in order to judge of the correctness of those statements, and accordingly came on Saturday afternoon, December 31. He was shown into the dining-room and into the drawing

room, and said that he was satisfied. The defendant says that pictures worth about 3,000*l.* were in these two rooms. The plaintiffs' manager then said that he had 100*l.* with him, which he could lend the defendant then, that he had no more with him, but would lend another 50*l.* if the defendant would call at their office in the next week. A conversation then took place as to the terms. The defendant had previously refused to give a bill of sale, and no other security was suggested. The manager said that he should expect 50*l.* for the loan of 100*l.*, taking a promissory note for 150*l.*, payable by twelve monthly instalments of 12*l.* 10*s.* each. The form of the note was produced, and it contained a clause that on default in payment of any instalment the whole was to become due. The defendant made no objection to the terms, or to the default clause, but asked whether if he was able to pay off the whole before the time a reduction would be made, and he was told that in that event a substantial reduction should be made. The defendant signed the note now sued on, and a few days afterwards went to the plaintiff's office, got the other 50*l.*, and signed another similar promissory note for the repayment of 72*l.* by six monthly instalments. On the occasion of his signing the second promissory note he made a statutory declaration as to his property, and when he signed the first note he had given a receipt for the 100*l.*, in which he made similar statements. The defendant quite clearly understood all this. He is intelligent and a man of business, not one of those company directors who are sometimes seen in Courts of Justice, and who appear to have been selected for the office not because of their knowledge of business, but because of their want of it. He was not in any great necessity; he merely wanted to pay off the few creditors he had to the amount of 150*l.*, and believed, and, as the event I think proved, was right in believing, that he could pay the monthly instalments, and he no doubt preferred to pay the 50*l.* asked by the plaintiffs for the accommodation rather than disclose his temporary embarrassment to any friends who knew him by trying to borrow from them or through them on better terms. He paid the monthly instalments until the month of August, not

exactly on the due dates, but never more than a day or two late, and he thus had paid off the whole of the 72*l.* note, and had paid seven out of the twelve instalments on the 150*l.* note. He did not, however, pay the instalment due on September 1, and on September 7 he wrote excusing his non-payment on the ground of the holidays, and added:—"As I have already paid more than the amount of the loans I shall be glad to know the net amount you would accept to settle the balance." The plaintiffs, or rather the liquidator of the plaintiffs' company which appears then to have gone into liquidation, wrote back asking for the cheque to be sent as soon as possible, and stated that they "were unable to make any reduction." The defendant took no notice of this letter, but upon getting another letter again asking for the cheque for the 12*l.* 10*s.* he consulted a solicitor, who wrote on September 18 the following letter:—

"355, Birkbeck Bank Chambers, Holborn, London, W.C.,

September 18*th*, 1905.

"DEAR SIR,—My client, Mr. T. Johnson-Smith, has seen me in reference to your letter to him of the 8th inst., and has instructed me to offer you a sum of 10*l.* 10*s.* in full satisfaction of your claim against him for principal interest and costs.

"This, added to the 159*l.* 10*s.* he has repaid you, works out at more than 30 per cent. interest per annum for the period he has had the money.

"Having regard to the value of the security which you hold the interest you are charging is excessive.

"I shall be pleased to hear from you.

"Yours faithfully,

"(*Signed*) WALTER S. CROOKES.

"The Liquidator, C. and C. Carringtons (Ltd.),
9, Old Cavendish Street, W."

There was, of course, no security, and the solicitor seems to have been misinstructed or to have made a mistake about this, and it will be observed that the offer only gave the money-lender 20*l.* for his loan of 150*l.* cash, and that by

reopening the transaction on the note which had been paid in full without demur, on the advance in respect of which the plaintiffs are now suing, they were to have no interest at all. This letter led to further correspondence, which, however, was without prejudice, and shortly afterwards the writ in this action was issued. These facts appear to be consistent with the defendant's having agreed to the plaintiffs' terms without ever intending to comply with them, but intending all along to set up, as he is now doing, the Money-lenders Act, and to try and get off on paying some small rate of interest, knowing very well that the plaintiffs never would have made him the advance on such terms. Such conduct, however, would in my opinion be grossly dishonest, and the defendant being apparently quite a respectable man, I hesitate to come to the conclusion that his conduct is to be accounted for in that way, and prefer to assume that he had intended to pay, but that some time about September he changed his mind on what appears to me to be bad advice. It is, I think, necessary to consider very carefully whether the Money-lenders Act applies to such a case as this. There seems to me to be from first to last no misrepresentation by the money-lenders, and no taking advantage of the ignorance or of the necessity of the borrower. There is nothing but the taking of 50*l.* for a loan of 100*l.*, repayable by instalments over twelve months. The rate of interest calculated at a rate per annum on the amount of principal remaining due from time to time works out, I believe, at about 75 per cent. per annum. I do not know whether the defendant by his letter of September 7th meant to call on the plaintiffs to fulfil their promise to make a reduction if he was able to pay before the money was due, but he does not remind them of it, and it will be observed that he was then in arrear. I cannot think that there is anything to complain of in the formal reply asking him to pay up his arrears, and, except the solicitor's letter, which hardly assists the defendant's case, all the remaining correspondence is without prejudice. We are therefore unable to say what offers may subsequently have been made, nor can any subsequent refusal of the money-lender to make a reduction for present payment

bring the case within the Act if it was not so before. It is said that the Money-lenders Act applies because there was no risk. On the facts, as I have found them, of course the plaintiffs did not really run any substantial risk of losing their money, because the defendant has ample goods on which to levy when judgment is obtained against him; but it by no means follows that the plaintiffs knew or ought to have known how safe the matter really was. They had no security, and were accepting the defendant's personal promise to repay and his own assertions of his ability to do so, uncorroborated otherwise than by his being in apparent possession of a good house of furniture and pictures; and any money-lender must know that there are always risks of the statements of borrowers proving incorrect. Under these circumstances I should suppose a high rate of interest would certainly be suggested, and the borrower's willingness to pay that high rate would tend to make the lender think the risk likely to prove greater than he had thought rather than less. So far as the risk is material, it seems to me that it is not what was the real risk as ascertained after the event which has to be looked at, but how the matter would present itself to the lender at the time with the experience he certainly would have of borrowers. I do not, however, think that the risk is the only matter to be considered. The words of the Act, leaving out those which are immaterial, are "where proceedings are taken, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, &c." Now it is not, of course, permissible to construe the words of the Act by any knowledge we may have of the circumstances under which the Bill was brought in, or of the intentions of those who promoted it, or as to what was introduced into the Bill by way of amendment. I think, however, that the words of the Act do of themselves show quite clearly that an effort has been made (possibly without much success) to define the

transactions which the Court may reopen. These seem to me to be clear indications that it was not intended to give jurisdiction to a Judge to reopen transactions merely if in his individual opinion too much interest had been charged. Further, I think any Court ought to lean against any such construction of an Act of Parliament. The function of a Judge in this country, and I should think, in all civilised countries, is to ascertain and deduce the rules of law (or of equity when there was a distinct system of equity as distinct from law), and to decide the rights of the parties before him according to those rules, and not according to his own idea of abstract right or justice. When, before the Judicature Act, a bill was dismissed for want of equity, what was meant was that the suitor had not brought the case within the rules according to which the Court of Equity gave relief, and not that there was no abstract equity or justice in his case. It would, in my opinion, be mischievous in the extreme if the Legislature were, even in a limited class of cases, such as those between money-lenders and borrowers, to give the Judges jurisdiction to decide cases without some definite rule to go by, and I do not think they have done it, although in the Act now under consideration there is considerable difficulty to find the rule. No great while after the Act passed, Mr. Justice RIDLEY, in *Wilton* v. *Osborne* ([1901] 2 K. B. 110), in a judgment in which he reviewed the equity cases, held that "harsh and unconscionable or otherwise such that a Court of Equity would give relief" meant so harsh and unconscionable as that a Court of Equity would give relief, or in some other way besides that recognised way such that a Court of Equity would give relief. I also held the same, but I think that my opinion may have been unduly influenced by the personal knowledge I had as to how the words in question got into the Act of Parliament. The Court of Appeal, however, in *In re A Debtor* ([1903] 1 K. B. 705; 72 L. J. K. B. 382), held that this view was wrong, and that a transaction may be "harsh and unconscionable" within the meaning of the Money-lenders Act, though not so harsh and unconscionable as that a Court of Equity could have given relief before the Act. That decision is, of course,

binding on me, and the rule laid down by Mr. Justice RIDLEY is therefore gone, and we must look somewhere else for the rule as to what transaction may be reopened. The difficulty is that the words remaining are so vague. Harsh and unconscionable are not easy words to construe when the rules of the Court of Equity have been put out of consideration, but they are at any rate used to describe some conduct of the money-lender, and it may be easy enough in many cases to say whether or not his conduct can be fairly described by those epithets. There is a much greater difficulty as it seems to me in the word "excessive." It is a relative word —exceeding what? Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the *maximum* of lawful interest. There are, however, some words further on in the section which I think are a guide to the meaning of the Legislature in the use of the word "excessive." If the transaction is reopened the Court may "relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such interest as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable." It seems, therefore, that the Court is to make an adjudication as to what interest, "having regard to the risk and all the circumstances," is reasonable, and then if the interest charged is in excess of that amount it seems that it is excessive within the meaning of that word as used earlier in the section. This task would often be a difficult one, but amongst "all the circumstances" which the Court is to take into consideration, surely the fact that the borrower has thoroughly understood the transaction and, knowing all the facts much better than the Court can possibly do, has been quite willing to pay the interest asked is one of the circumstances which the Court must consider. Often the Court will not have that circumstance to guide them. The borrower is frequently ignorant, sometimes imposed upon; frequently in such straits

that he has no alternative, but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be of no real guide to the Court. But in the case before me there is nothing, unless the Act of Parliament forbids it, to prevent my saying that the defendant knew much better than I do what it was reasonable for him to pay for the accommodation he wanted. I see nothing unreasonable in a man who has an income of 1,000*l.* a year, and who may know that he can if he likes live on 750*l.*, preferring to pay 72*l.* to a money-lender for the money which is to relieve him from a temporary embarrassment rather than tell his banker or his solicitor or any friend that he is in temporary embarrassment; a man cannot borrow otherwise than from a money-lender except from or with the assistance of people who know him. I do not, of course, know the exact nature of the debts which this defendant desired to pay off. He was not asked, and did not tell me. Even if the debts were only incurred by household expenses beyond his income, or by buying to an extent beyond his income pictures or bronzes, which he seems to collect, he might not desire to disclose that extravagance to his friends; but, of course, if it happened that the liabilities were incurred in some other way—such, for instance, as in any form of gambling, of which he might be heartily ashamed—he would be even less likely to wish to disclose it, and be more willing to pay high interest to a money-lender. Why should I say that he was unreasonable in what he did, when he, an intelligent man, must know his affairs better than I do? I now proceed to deal with the cases on this Act. In *Re A Debtor* the actual decision, as I have already pointed out, was merely that "harsh and unconscionable" was not limited to such cases as a Court of Equity before the Act would have held to be harsh and unconscionable. The MASTER OF THE ROLLS, however, and Lord Justice COZENS-HARDY each say that under this section the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This is reported and emphasised by Lord Justice COZENS-HARDY in *Wells* v. *Allott* ([1904] 2 K. B. 842), a case in which the actual

decision merely was that the fact of interest being high, and therefore *primâ facie* excessive, was sufficient ground for giving a defendant leave to defend under Order 14. I hardly think the head-note of the last-mentioned case in the Law Reports is correct, as I do not find in the report that the Lords Justices committed themselves to the view that the question at the trial would be as stated in that head-note, "whether the interest was so excessive as to render the transaction harsh and unconscionable." It may be observed that these expressions of opinion as to the possible consequences of "so excessive" interest are at present *dicta* only. Further, they are *dicta* in cases where the question was whether there should be further investigation, and not where the facts were ascertained and the question was what decision should be given on them. No Judge, at any rate in the High Court, has yet held in any reported case that any particular rate of interest proved before him—say even 500 per cent., or anything of the kind—is "so excessive" as to be in itself harsh and unconscionable. When, if ever, any Judge does so, we shall have to read into the Act that which, as it seems to me, the Legislature intentionally avoided putting there—viz., a *maximum* rate of interest such as were enacted by the old usury laws. I cannot help thinking that it is owing to a complete misunderstanding of these *dicta* that an idea seems to prevail in some quarters that if only it is shown that a high rate of interest has been charged by a money-lender a Judge has complete power at his discretion to make a new contract for the parties. I am sure that those two learned Lords Justices meant nothing of that kind. They may have meant that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or they may have meant that the same circumstances which showed that the rate was excessive might, and often would, show that the transaction was harsh and unconscionable. At the end of Lord Justice Cozens-Hardy's judgment in *Re A Debtor*, at p. 711 ([1903] 1 K. B.), he expressly says that in considering whether the interest is excessive the Court must have regard to all the circumstances of the case, which is the proposition

upon which I think the whole matter turns. In *Saunders* v. *Newbold* ([1905] 1 Ch. 260) the borrower was found by Mr. Justice KEKEWICH to have had his business capacity, in fact, impaired by habits of intemperance, although the Judge thought that this had not gone to such an extent as to be apparent, so that the money-lenders were justified in dealing with him as a person of capacity. Under those circumstances the Judge naturally did not consider that the fact that a man so incapacitated had agreed to pay the interest was a material circumstance to be considered on the question whether the interest was excessive under the circumstances. Nor should I consider it material in such a case; but here I am satisfied that the defendant is a man of good business ability. The grounds on which Mr. Justice KEKEWICH held, and the Court of Appeal affirmed, that the transaction was harsh and unconscionable, do not appear to apply to my case, though no doubt the judgments support the argument of the learned counsel for the defendant in this case that the risk is very material to be considered. Then there is the case of *Poncione* v. *Higgins* (21 The Times Law Reports, 11), also before the Court of Appeal. There Lord Justice VAUGHAN WILLIAMS says as to the Money-lenders Act: "The intention of the Legislature was to deal with cases of persons in financial distress coming to money-lenders in order to get out of their financial distress, which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the money-lender." That seems to me a very important expression of opinion. The facts of that case were so different to those before me that it is unnecessary to go into them. Lord Justice ROMER says that in every case the Judge should go into all the circumstances under which the loan was made, and points out that in that case the position of the plaintiff (the money-lender) cast on him duties towards the defendant (the lady borrower), that the plaintiff knew the defendant was relying on him, and that the defendant was a "foolish" woman. Under those circumstances the case was, of course, a plain one. Lord Justice COZENS-HARDY repeats his proposition that the interest might be

deemed so extravagantly excessive as alone to satisfy the Court that the transaction was harsh and unconscionable, on which I have already commented. He says also that all the circumstances must be considered, and he enumerates various circumstances which he thinks have to be considered, and he does not amongst them mention that one which seems to me so very material when it is present—viz., the free and voluntary agreement of a competent and intelligent borrower to pay the interest asked; but then that point did not arise on the facts before him, nor, indeed, does it very often arise. Then there is a recent case before Mr. Justice JOYCE, *Part* v. *Bond*, reported 93 Law Times, 49, and 21 The Times Law Reports. In that case an advance at a high rate had been made, secured by a second mortgage on some property of the borrower. Mr. Justice JOYCE says: "The Act gives no indication what rate of interest is to be deemed excessive under it, nor what transactions are to be deemed harsh and unconscionable"; and, after commenting on the word "harsh," says: "With regard to the rate of interest, I think that the rate of interest is excessive if it be extraordinary, such as much higher than 10 per cent., or even less on a reasonably safe security, and if an excessive rate of interest be obtained merely through the folly or weakness of the borrower or his urgent necessity, real or imaginary, with knowledge on the part of the lender such as he must possess, then in my opinion the transaction is harsh and unconscionable." Now, with this statement as to what is harsh and unconscionable I entirely agree; but there is no doubt as to what the learned Judge meant to say as to the interest. I think he meant the words "on a reasonably safe security" to apply to the words "much higher than 10 per cent.," as well as to the words "or even much less." That is to say, that he meant if there was a reasonably safe security 10 per cent., or even less, would be excessive. In the case before him there was security. There is, perhaps, something like a market rate for loans on security, but I do not see how there can be any rate, ordinary or extraordinary, for loans on a promissory note without security, and I hardly think the Judge would have referred to 10 per cent. in

reference to such loans. One of the difficulties of dealing with the question of interest on the footing of what is "ordinary" or extraordinary is that the efforts of the Legislature to assist borrowers undoubtedly have the effect of raising the normal rate of interest. It is a notorious fact that the Bills of Sale Act, 1882, making void bills of sale not according to a form, had the effect, as soon as a few decisions had been given on it, of raising the normal rate of interest on money-lenders' bills of sale from 25 per cent. or 30 per cent., which had been about the highest before, to 60 per cent., which became the regular rate. This was pointed out by Mr. Justice CAVE, and may easily be verified by a reference to the reported cases on bills of sale. Practically, I think any test as to interest being ordinary or extraordinary is, for the pur pose of the Money-lenders Act, out of the question, except, perhaps, in cases of loans on security. There can be no standard rate on personal loans; and where the parties are reasonably on terms of equality, a Judge cannot, I think, do better than adopt what they themselves have agreed on, although, of course, when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances. I next come to a decision of my own, *Levine* v. *Greenwood*, reported in 20 The Times Law Reports, 389, which has been followed in Ireland by the LORD CHIEF JUSTICE in a case of *Wells* v. *Joyce* ([1905] 2 Irish Reports, 134). I there held that a default clause understood by the lender, but not understood by the borrower, made the transaction harsh and unconscionable. To that I quite adhere. There may be some difficulty about the word "harsh," but "unconscionable" seems to me to quite hit that case. Amongst the very things that the Act does mean to hit—and I think does effectually hit—are the money-lending traps for the unwary. I should not hold 60 per cent. per annum to be of itself necessarily excessive or harsh and unconscionable, though, of course, the circumstances might easily make it so; nor should I hold interest of 1*s.* in the pound per month (which, of course, is 60 per cent. per annum) to be necessarily so either; but if I found, as would most likely be the case, that the interest was put into the shape of 1*s.* in the pound per

month in order to disguise it, and that, in fact, the borrower had not appreciated it, I should then hold that the interest was both excessive and harsh and unconscionable. In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident in his ability to pay and that he would not make default, and when this clause was under discussion what he said was in substance that he was more likely to want to pay before it was due than to get into arrear, and wanted to know what reduction would be made in that case. This case does not seem to me to be at all the same as *Levine* v. *Greenwood*. I would also point out that the Money-lenders Act does not, as the Bills of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for an indefinite time, of course the rate of interest is all-important, but where the loan is for a definite period, repayable by instalments or otherwise, I do not think the borrower generally cares very much what the rate of interest on the amount from time to time outstanding as his instalments are paid works out at. What he does want to know is how much he is to pay for getting the accommodation which he asks, and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not. Assuming, however, that he is willing to pay the sum asked of him for the loan for a year, he probably will not be willing to pay that sum for the loan for a month only, and consequently a default clause not understood is in my opinion a trap. I have now gone through all the cases, and the conclusion at which I arrive is that the Judge is entitled to consider amongst "all the circumstances of the case" the fact that the borrower thoroughly understood the transaction, and, without any misrepresentation or any pressure other than the mere request to pay so much interest, voluntarily agreed to pay it, and I myself think that when the Judge finds those to be the facts he ought to find that the interest which the man so agrees to pay is reasonable and, therefore, not excessive within the meaning of the Act. I do

so find. I think I ought to add that this view of the Act in no way interferes with its operation in all the cases to which it was, as Lord Justice VAUGHAN WILLIAMS pointed out, really meant to apply. Whenever the borrower is in such a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free will—there is no difficulty in applying the Act, and Judges are not likely to hesitate to apply it. I ought further to say that if in this case I found that the defendant had from the first intended not to pay the interest contracted for, but meant to lay a trap for the money-lender and take his money, and then, when he had repaid by instalments the amount of actual money received, to set up the Money-lenders Act and claim to be relieved from payment of the interest contracted for, I should hold that that conduct also would be a circumstance which I ought to take into consideration, and that I ought to hold in that case that it was most reasonable that he should pay what he contracted to pay. He was, to use Lord Justice VAUGHAN WILLIAMS'S expression, in a position to bargain on terms of equality with the money-lender. The very able argument of the defendant's counsel, Mr. Napier, was based mainly on the absence of risk by reason of the defendant's ability to pay. If it were the case, which I am afraid often happens, of a borrower yielding to pressure put upon him by a money-lender taking advantage of his necessities, I should not say that the mere fact of his knowing of the Money-lenders Act and intending to try and get the benefit of it to relieve him of some part of what he had under pressure agreed to would disentitle him to that relief; but for a man in the position this defendant was to take the loan on the plaintiffs' terms, apply the money for the purpose for which he wanted it, and then turn round and say that he would not pay the agreed price of the accommodation because it was excessive, is a very different case, and I should have no hesitation in saying that as against him it was not excessive. I have already said that I was not prepared to find that this was the true explanation of this defendant's conduct, but rather

assume that he is, as he appeared to be, a respectable man who would not so act. I have based my judgment in this case on the ground that the interest must in the special circumstances of this case be adjudged to be reasonable, and therefore not excessive, but I must add that I am quite unable to see how on the facts the transaction can possibly be said to be harsh and unconscionable. Whatever may come within the true meaning of those words as used in the Act, they certainly do refer in some way to the conduct of the money-lender. Here all he did was to name his price for a loan without security to a man whom he did not know, depending only on his personal assurance that he had means to repay, with such corroboration as seeing the style in which he lived and the furniture and pictures which he claimed to be his afforded. That price the borrower, without being in any really pressing necessity, immediately agreed to give without any bargaining or remonstrance, merely asking one question and getting a satisfactory answer. Even if the price asked was higher than would be expected to be agreed to between two parties bargaining on equal terms, why is the mere proposal of the terms harsh and unconscionable? I fail to see that it is. I therefore give judgment for the plaintiffs for the 62*l.* 10*s.* I do not give any interest, as the last instalment is only just due, but I do give High Court costs. If the defendant desires a stay he can have it on paying the money into Court.

APPENDIX G.

In the Court of Appeal,

Monday, May 4th, 1903.

Before LORD JUSTICE STIRLING and LORD JUSTICE MATHEW.

SAMUEL *v.* BURTON.

[*Transcript from the shorthand notes of Mr. William Rogers, 93 and 94, Chancery Lane, London, W.C.*]

JUDGMENT.

LORD JUSTICE STIRLING: This is an appeal from a decision of Mr. Justice BIGHAM, directing that judgment should be entered for the sum of 109*l.* The circumstances are these: The action is brought by a money-lender for the amount which he alleged to be due, namely, 109*l.* Upon that an application was made to the Master that an inquiry should be made in accordance with the provisions of the Money-lenders Act. That Act requires that before such relief is given under it the Court should be satisfied that the interest in respect of the sums lent is excessive and in addition that the transaction is either harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. It appears to have been held, in the first instance, when cases arose under this Act, that upon the true construction of the Act relief could not be given unless the interest was both excessive and the transaction was in respect of its being harsh and unconscionable, such that a Court of Equity would give relief. That was a decision in the Court of first instance. Afterwards the matter came before the Court of Appeal in the case of *Re A Debtor*, which is reported in the

current number of the Law Reports, King's Bench Division, at p. 705, and there it has been laid down that, under the Act in question, a transaction with a money-lender can be reopened when the Court is satisfied that the transaction is "harsh and unconscionable," even though it is not "such that a Court of Equity would have given relief before the Act," and in giving judgment the learned Judges, by the MASTER OF THE ROLLS, say this: "I will not say that, under this section, the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable even as against a borrower who was of full age, and who stood in no special relation to the lender." Now what took place in the case which we have here is this. The Master made an order for an inquiry under the Money-lenders Act. That was appealed to the learned Judge, and thereupon, as I understand, the order that has been read by Mr. Lawson Walton, the learned Judge said that he would take the inquiry himself, and that was done in this way. The parties appeared before him in chambers; the plaintiff, who was the money-lender, was examined, and cross-examined before him; but the borrower, although he appeared by counsel, was not examined or cross-examined, his counsel deliberately abstaining from calling him as a witness. Now, in these circumstances, it is said on behalf of the borrower, who is a man over thirty years of age, admittedly a man who is a man of business engaged under his father in an advertising business, and as to whose capacity no allegation or suggestion is made, is this: "I had no separate advice" (reading defendant's affidavit to the words) "exorbitant rate of interest I was paying." Now let us see what the transactions were. I do not propose to go through them all, but it begins with this transaction, that on the 1st of October, 1901, he borrows 40*l.*, undertaking to repay 50*l.* by five monthly payments of 10*l.* He actually repaid 40*l.* by four instalments, leaving 10*l.* still due. He then proposed, some time in 1902, to borrow 30*l.* more, thus having borrowed 40*l.*, or having 40*l.* owing from him. That he agreed to repay by five monthly instalments of 10*l.* In June, 1902, he had repaid 40*l.*, leaving 10*l.* due, and he then borrowed 30*l.* and

entered into a similar agreement to pay 50*l.*, by five payments of 10*l.* each monthly. Then in July he procured the lender to cash a post-dated cheque for 25*l.* post-dated for two months for 23*l.* 10*s.* In September there was owing to the money-lender 30*l.* in respect of the first transaction, and 25*l.* in respect of the second, making 55*l.*, and then he borrowed 45*l.*, making 100*l.*, and in respect of that he promised to repay 144*l.* by twelve monthly payments of 12*l.* each. He paid the instalments due up to February of 1903, leaving 84*l.* due. In December he again procured the money-lender to discount a cheque for 25*l.* post-dated for two months, and in respect of that he got 20*l.* Then when the March has come, not having repaid the amount due on the cheque, and not having paid the instalment which became due in March, the money-lender issues his writ. What the amount of interest is that is actually charged for these transactions does not actually appear, and I am not prepared to say what it is. It may be 80 per cent. or not, I do not know, but it is to be observed that the transactions are perfectly plain on the face of them. The borrower knew perfectly well what he got, and what he was going to pay. It was put to him in the clearest form, and although he may not have appreciated the rate per cent., still he was a man of business, and he might very well have ascertained, but he did not choose to ascertain. That is all he says. I am not prepared to say that the interest is charged at such an excessive rate that the transaction ought on that ground to be held to be harsh and unconscionable within the meaning of the Act, and, that being so, no advantage having been taken of him, he being a man of full age and a man of business, I do not see, any more than Mr. Justice BIGHAM seems to have done, any ground for giving him relief under the Act, and I think the appeal ought to be dismissed.

LORD JUSTICE MATHEW: I am of the same opinion. The learned Judge undertook the inquiry under the Act, and his attention was directed necessarily according to the terms of the Act to the two questions, whether the interest charged was excessive, and whether the transaction was harsh and unconscionable. No case has been made out for that. I

pass by the suggestion of something that the learned Judge is said to have remarked as to previous decisions. I am sure he has been misunderstood with regard to that. Those are the two questions that he had to deal with. Now I agree with what the Court of Appeal has said, and I am sure that Mr. Justice BIGHAM would agree also that excessive interest may create a presumption of harsh or unconscionable conduct. It depends upon the circumstances of each particular case. If a money-lender is dealing with a clerk in needy circumstances, and knows perfectly well that if the clerk's employer knew that he was borrowing money in that way he would probably be dismissed, the inference of harsh and unconscionable conduct from an unreasonable rate of interest might very properly be implied, but in this case can we say that any such rule ought to be implied? It was suggested, in the first place, that there were a number of small transactions here, small borrowings, small amounts of money which would seem to indicate a condition of things which might be a temptation to a money-lender, and therefore we asked for information as to what the real transactions were. Now, it really comes to this in the end, that the plaintiff got from his debtor, who owed him 55*l.* in respect of former transactions and who borrowed 45*l.* more, the money-lender got an undertaking to pay 100*l.* with interest by twelve instalments running over the year, in other words, to pay 144*l.* in respect of what may be treated as an advance of 100*l.* Now, is that harsh and unconscionable? The defendant was not in a position to offer any evidence whatever on the subject. It was suggested in a affidavit that he did not quite understand how the interest was made up. Whose fault was that? There was no mystification about the different transactions; he is an adult engaged in business, and he did not have the boldness to satisfy the Judge that he did not know or could not have found out if he did not choose to shut his eyes as to what the exact nature of each transaction was. That being so, every opportunity was given to the defendant of showing that he had been treated harshly and unconscionably, but he withdrew practically from making any such imputation upon the plaintiff; and his

counsel here to-day said, no matter what inquiry he might have made on the subject, he could not have added anything to the evidence for the learned Judge in support of his contention that the terms were harsh and unconscionable. Under these circumstances, the learned Judge's conclusion in point of fact was perfectly right, and must be upheld. This appeal must be dismissed.

APPENDIX H.

In the King's Bench Division.

Saturday, 8th August, 1903.

Before MR. JUSTICE DARLING.

SAMUEL *v.* MILES.

[*Transcript of Shorthand Notes of Messrs. Bennett and Law, 22, Southampton Buildings, Chancery Lane, W.C.*]

JUDGMENT.

MR. JUSTICE DARLING: In this case the defendant borrowed money at a rate apparently of about 55 per cent. He gave no security. He simply signed a promissory note, which may or may not be worth anything. That is a contract which he has entered into. He is apparently quite sane, and, therefore, it is a contract, like any other contract, by which he is bound, because he has chosen to enter into it. If it is a disadvantageous contract, and he did not understand how disadvantageous it was, that only arises when a man buys all sorts of things. If a man who does not understand a horse, buys a horse, he cannot say to the person from whom he bought it, "I am not going to pay you for it because I find out that I do not understand horses, and therefore, although I have got it, and have used it, I am not going to pay for it," because that is what has happened here. I must come to the conclusion, in order to set this contract aside, that the rate of interest was excessive; and if I came to that conclusion it is not enough. I must further come to the conclusion that in the circumstances the transaction was harsh and unconscionable. I do not think the rate of interest can be said to be excessive, because I really do not know what

standard to set up. If a person lends money upon no security at all, I do not know what would be the normal interest—I cannot find out. If I cannot find out the normal interest, I cannot find out what would be the excessive interest. I have nothing to judge it by, therefore I cannot say that it is excessive in the circumstances. If he had asked him to lend him money at 55 per cent., and deposited with him 1,000*l.* worth of Consols, one could easily have said, "It is excessive because the security is so good," but here there is no security. Now suppose it were excessive, even then I should have to say the transaction is harsh and unconscionable. As to whether it is harsh there is nothing to show it is harsh, because he was not in the least in the power of the money-lender. It was the first transaction. Is it unconscionable? Mr. Clapcott says, as I understand him, that it is all wrong because the money-lender sent a circular to the plaintiff and tempted him to borrow money. If it is unconscionable to send a circular and ask a man to borrow money, then it is unconscionable to send a circular and ask a man to buy wine. Also, it would be unconscionable to put jewellery in the window where women can see it, because they might be tempted to buy it, and the same with silks and things of that kind. I do not think this case comes within the Act or anything like it. There must be judgment for the plaintiff for 210*l.* with costs.

APPENDIX I.

NOTES ON THE LEGAL CONTRACT OF LOAN OF MONEY (FOR UNPROFESSIONAL READERS).

INTEREST.—Unless stipulated for, or payable by some known usage or custom of trade, as in the case of advances by bankers to their customers, or to be inferred from the course of dealing between the parties, interest is not payable upon money lent.

By 3 & 4 Will. IV. c. 42, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest (*a*) from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law." This statute, however, has no special relation to loans of money, but applies to them equally with tradesmen's bills and other liquidated demands. There is a great distinction between interest payable by contract and interest recoverable under the statute, for the latter is recoverable only as damages: consequently it can be recovered only in an action for the principal, whereas, in the case of interest payable by contract,

(*a*) At the date of this statute the usury laws were in force. The current rate was 5*l.* per cent. per annum. The repeal of the usury laws has not affected this statute.

it may become a debt recoverable with or without the principal debt. Accordingly, in the case of agreed interest, actions may be brought from time to time for interest in arrear without the principal being sued for. Interest under the statute is not a matter of right, but a discretionary power to be exercised by the jury, who need not give interest at any particular rate, or indeed at all, unless they think fit to do so. Contract interest is, or may be, treated as an accretion to the original debt, but interest recoverable under the statute cannot be so treated, at any rate until judgment has been obtained for it.

Compound interest may be stipulated for, or it may be chargeable by the custom or usage of trade, as by bankers, or under a course of business established between the parties, as where an agent has been in the habit of delivering accounts made out with yearly or half-yearly rests, with the addition of interest at each rest, and the accounts have been settled by the principal upon that footing.

Interest payable upon money payable abroad is, in the absence of stipulation, payable according to the rate which is current at the place of payment.

INSTALMENTS—DEFAULT CLAUSE.—A clause commonly called "The Default Clause" is generally contained in promissory notes given to money-lenders for payment by instalments. It provides that upon default in payment of any instalment the balance remaining unpaid upon the note is to become at once due and payable. This clause is discussed in relation to the Money-lenders Act, *ante*, p. 55.

In the absence of such a clause the creditor is not entitled, upon his debtor making default, to claim the balance remaining unpaid as a liquidated debt. If, however, the debtor repudiates the whole transaction by announcing in plain terms that he does not intend to make any more payments or in any other manner sufficiently manifests an intention not to be bound by the contract, the creditor may, if so minded, at once sue him for any instalments which are overdue, and for damages for breach of contract, in which case the measure of damages will be the amount outstanding, subject to such rebate in respect of the agreed date of

payment being anticipated as the jury may think proper to allow. The creditor need not, however, take this course. He may treat the contract as subsisting and may sue from time to time for the instalments as they become due.

INTEREST AFTER JUDGMENT.—Interest runs upon a judgment at 4 per cent. It is, however, competent to the parties to stipulate for interest to run after judgment, upon such judgment at a higher rate, and such a stipulation may be given effect to; but it must be stipulated for in clear terms, otherwise the debt will be regarded as merged in the judgment, and interest upon the judgment at 4 per cent. will alone be payable.

LOANS TO INFANTS.—See the Infants' Relief Act, 1874, and the Betting and Loans (Infants) Act, 1892, in Appendix B. Monies advanced to infants who are in need of "necessaries" may be recovered, notwithstanding the Infants' Relief Act, if the lender can prove that the infant was "necessitous" and that the money advanced was actually expended upon "necessaries." But this subject belongs to the subject "Infancy."

LOANS TO MARRIED WOMEN.—If a married woman is so circumstanced with regard to her husband that she is in a position to pledge his credit for "necessaries," advances made to a "necessitous" wife, which are actually expended by her upon "necessaries" are recoverable from her husband. But this subject belongs to the subject "Married Women."

LOANS TO LUNATICS are valid unless the fact of lunacy was known to the lender.

LOANS TO CORPORATIONS AND COMPANIES.—Different kinds of corporations and companies have different borrowing powers. In all cases the lender should satisfy himself that the borrowing corporation or company has, legally, power to borrow and to give the agreed security, and also that the persons who execute on behalf of the corporation or company the agreed documents, have authority to bind the corporation or company by their acts.

SPECIFIC PERFORMANCE is a remedy which is not available. Neither a man who has agreed to lend money, nor a man who has agreed to borrow money, can be compelled specifically

to perform his contract. An agreement to take debentures from the issuing company is an agreement to lend money.

DAMAGES.—A man who contracts to lend a definite sum of money to another for a certain time on certain terms may be sued for damages for breach of his contract. So also may a man who has agreed to borrow a certain sum of money for a certain time on certain terms. In an action by contracting borrower against contracting lender the measure of damage would in most cases be the difference between the sum which the borrower would have had to pay to the lender for interest if the contract had been carried out, and the interest which the borrower had to pay for the accommodation elsewhere, he having done his best to obtain the money elsewhere on terms equally advantageous with the contract terms. Conversely, in an action by contracting lender against contracting borrower, the measure of damages would ordinarily be the difference between the interest which the borrower agreed to pay and the interest which the lender was able to obtain for the stipulated period, he having used his best endeavours to invest his money on terms equally advantageous with the contract terms. Any damages beyond these would be only recoverable under very special circumstances. Where a loan, if made, would have been repayable on demand, no damage under ordinary circumstances would be recoverable for the breach of contract to lend or to borrow as the case might be.

I.O.U.—A mere I.O.U. containing nothing more than an acknowledgment of indebtedness in a specific sum is admissible in evidence without a stamp. If it contains anything more it may require to be stamped either as a promissory note or as an agreement.

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